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CHARLES ELMORE COOPLY
CLERK

IN THE
**SUPREME COURT OF THE UNITED
STATES**

October Term 1938

No. 276

GEORGE COUPER GIBBS (LANDIS), individually and as
Attorney General of the State of Florida, et al.,
Appellants,

-vs-

GENE BUCK, Individually and as President of the
American Society of Composers, Authors and
Publishers, et al., *Appellees.*

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF FLORIDA.

BRIEF FOR APPELLANTS.

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Attorney General of Florida.

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ERRATA

Appendix iv Under word "APPENDIX" insert—(The Statute involved in this suit) Laws of Florida, 1937, Vol. 1, p. 204, Chapter 17807.

Brief Page

3 First paragraph, line 3, following "Vol. 1"—insert "page 204"

26 Citation to Dahnke Walker Co. v. Bondurant, should read: "257 U. S. 282"

39 Footnote, following "*Interstate Circuit, Inc. v. U. S.*"—"304 U. S. 55"

54 Bottom of page—name of case cited should read: "*Witmark & Sons v. Pastime Amusement Co.*"

68 Middle of page—italicized paragraph should be set in bold faced type as a sub-caption, thus

"(1) (2) Section 1 does not constitute an unlawful interference with the Federal Copyright Act, but is a lawful exercise of the State's police power."

74 Paragraph citing Ozan Lumber Co. case, line 5, word reading "provions" should read "provisions"

78 Sub-caption in bold faced type now numbered "(1)", should be numbered "(3)"

- 81 Sub-caption in bold faced type now numbered "(2)", should be numbered "(4)"
- 87 Sub-caption in bold faced type now numbered "(3)", should be numbered "(5)"
- 88 First line, word reading "attach"—should read "attack"
- 93 Sub-caption in bold faced type now numbered "(4)", should be numbered "(6)"
- 96 Strike out "*Wörthen v. Kavanaugh*, 295 U. S. 56" and substitute: "*Atlantic Coast Line R. Co. v. Goldsboro*, 232 U. S. 548, 558"
-
- 109 Next to last paragraph, line 3—strike out letter "R." before word "see"
- 111 First paragraph, next to last line—record reference now "(R.)", should read "(R. 269)"

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IN THE
**SUPREME COURT OF THE UNITED
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October Term 1938

No. 276

GEORGE COUPER GIBBS (LANDIS), individually and as
Attorney General of the State of Florida, et al.,
Appellants,

-vs-

GENE BUCK, Individually and as President of the
American Society of Composers, Authors and
Publishers, et al., *Appellees.*

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF FLORIDA.

BRIEF FOR APPELLANTS.

OPINION BELOW.

The Opinion of the United States District Court for the Northern District of Florida appears in the record at page 268. It is not reported in any official report.

NOTE: Italics in quoted matter in this brief are supplied unless otherwise indicated.

JURISDICTION

Paragraph 1 of Rule 12 has been complied with and this Court has noted probable jurisdiction.

STATEMENT OF THE CASE

In 1937, and for many years prior thereto, there existed in the State of Florida a deplorable situation affecting the users of copyrighted music for public performance for profit. The publishers of copyrighted music had combined with the renowned and outstanding authors and composers of music into combinations or associations for the express purpose of fixing prices (Articles of Association of American Society of Composers, authors and Publishers, R. 44) for the licensing of rights of public performance for profit of their copyrighted music. The users were subjected to various kinds of discriminations in the rates charged for the use of music by the combinations or associations. They were forced to buy all or none of the copyrighted music which the various combinations controlled or claimed to control. They could not deal directly with any separate copyright owner for the use of his music which that copyright owner might control, but all negotiations for the purchase of performance rights had to be carried on with the price fixing combination or association who forced the purchaser to purchase the right to use all the music which the combination controlled at a price fixed and determined by the combination, not by the copyright owner, although the prospective purchaser may have had no desire to use the music of more than one copyright owner. (For a more detailed statement of

these facts with supporting references to the Record, see Argument, Part II, *infra*.)

To remedy this situation, the Legislature of Florida adopted Chapter 17807 at the session of the Legislature of the State of Florida of 1937, Volume 1, General Laws of Florida 1937, a copy of which Act is printed as Appendix I to this brief. This Act provided that all price fixing combinations or associations which determined the amount of money to be paid to it, or its members, for the privilege of rendering privately or publicly for profit copyrighted music, were unlawful monopolies and prohibited them from licensing the right of public performance for profit of copyrighted music in the state for the reason that such licensing agreements were in restraint of trade.

The Act further provides that the selling price as determined solely by the owner for the use of music for all purposes, shall be affixed to the composition before it is sold in Florida. The Act expressly allows the copyright owner to fix and determine the price to be charged for the use of the individual copyrighted music in this State, provided they are not engaged in an unlawful combination, as defined in the Act. (Sections 2-A, and 2-B of the Act.)

Section 6 of the Act provides that whoever uses copyrighted music for public performance for profit in this State, and are affiliated with persons, firms or corporations outside of the State transmitting such copyrighted music, which originally emanated either by radio, sound production, instrumental or otherwise, that liability for the payment of the use of the copyrighted music shall rest exclusively on the party outside of the State send-

ing the music into the state. With these three Sections, viz.: 2-A, 2-B and 6, the defendants in this suit, are in no manner concerned, because there is no duty on these officers to enforce them. See Section 9 of the Act.

Criminal violations of the Act are dealt with in Sections 7-B and 8 of the Act; both of which are definitely tied up with the acts of unlawful combinations as defined in Section 1, and by no stretch of the imagination could these penal provisions be so enlarged as to comprehend the prosecution of anyone for anything done or left undone under Sections 2-A, 2-B or 6 of the Act.

The Florida Act became effective on June 9, 1937 and on February 7, 1938 there was filed a bill of complaint, (R. 1) supported by various affidavits (R. 76-201 incl.) praying for an interlocutory and permanent injunction, restraining the defendants from enforcing any of the provisions of the Act.

On the same day the bill was filed, there was also filed a motion for interlocutory injunction and a request to the District Judge to convene three judges to hear the application for interlocutory injunction, as provided by Section 380, Title 28 U.S.C.

On March 3, 1938, the defendants filed a motion to dismiss the bill on the ground that there was no equity in the bill; that the Court did not have jurisdiction because it affirmatively appeared that the jurisdictional amount necessary to give a federal court jurisdiction was not involved; that the suit did not appear to be one arising under any federal law in which the jurisdictional amount was not required to be shown; that it

affirmatively appeared that the Act, insofar as these defendants were charged with the duty of enforcing it, was a valid exercise of the police powers of the State to prohibit monopolies; that the plaintiffs had come into a court of equity with unclean hands, because it affirmatively appeared that they were a combination or monopoly violating both the federal and state laws prohibiting monopolies (R. 205).

The defendants also filed a motion to deny the plaintiffs' motion for interlocutory injunction, and supported this motion with various affidavits denying that the defendants had threatened to enforce the provisions of the Act, and showing how various persons in this state were discriminated against by the Society (R. 210-267, incl.)

The cause came on for hearing on the 3rd of March, 1938, on the motion for interlocutory injunction and a motion to dismiss the bill and motion to deny the motion for interlocutory injunction, and the Court, after considering the same, on April 4, 1938, entered an order granting an interlocutory injunction and denying the defendants' motion to dismiss (R. 270). This order was entered without the Court making any findings of fact or conclusions of law, as required by Equity Rule 70½, but was accompanied by a "Memorandum Opinion" (R. 268).

Thereafter, on the 25th day of April, 1938, the defendants perfected their appeal from the order granting the interlocutory injunction, filing their assignments of error, (R. 272) in which one of the assignments of error was to the effect that the Court erred in entering the order allowing the injunction without first filing the

findings of fact and conclusions of law, as required by Equity Rule 70½. After the appeal had been perfected and all papers filed therein the Court, on the 17th day of May, 1938, entered its Findings of Fact and Conclusions of Law. (R. 276). Thereafter the defendants amended their statement as to jurisdiction and assignments of error so as to recognize the filing of the document (R. 272; Statement as to Jurisdiction).

Not only were these findings belatedly filed, but they utterly failed to comply with the spirit of Equity Rule 70½, as interpreted by the decisions of this Court. See Part IV of this brief.

The appeal was then lodged in the Supreme Court of the United States, and it being made to appear to this Court by motion that the defendant, Cary D. Landis, as Attorney General, had died since institution of the appeal, this Court allowed the substitution of George Couper Gibbs, Attorney General of the State of Florida, and successor to Cary D. Landis, the former Attorney General, over the objection of Gibbs.

SPECIFICATION OF ERRORS INTENDED TO BE URGED.

Appellants urge in this case that the Court below erred in denying defendants' motion to dismiss the bill for want of jurisdiction as a Federal Court (Assignments 1 and 3, R. 272); in denying said motion on the merits addressed to the want of equity in the bill in both assignments (Assignments 2 and 4, R. 272); in granting the temporary injunction without stating its findings of fact and conclusions of law, as required by

Federal Equity rule 70½ (Assignment 7, R. 273); in granting the temporary injunction without determining that the unconstitutionality of the statute was reasonably free from doubt (Assignment 8, R. 273); that the granting of the temporary injunction was an abuse of the discretion of the Court (Assignments 7, 9, R. 273); that the Court erred in not finding that the defendants were only charged with the duty of enforcing Section 1 of the statute and the Sections dependent thereon, viz: Sections 3, 4-A, 4-B, 5-A, 7-B, 8 and 9, that said Sections are valid enactments under the police powers of the state, and that the remaining Sections are without the scope of this suit (Assignment 10, A. 273).

SUMMARY OF ARGUMENT

Appellants' contentions are as follows:

I.

The District Court as a Federal Court was without jurisdiction to take the case.

Under this point of the Argument it will be shown that the requisite jurisdictional amount of \$3000, exclusive of interest and costs, is not involved in this suit; and further that while the suit is concerned with the public performance rights in copyrighted music, it is not one "arising under the *** copyright *** laws" of the United States, within the meaning of U. S. C., Title 28, Section 41(7).

II.

Even if the District Court had jurisdiction as a Federal Court, it should not have lent its injunctive aid in

the furtherance of the monopolistic power shown by the Record to be vested in the Plaintiff, American Society of Composers, Authors and Publishers.

Under this point of the Argument it will be shown that the Society is composed of composers, authors and publishers of copyrighted music, each of whom for a period of years has transferred to the Society exclusive public performance rights on all copyrighted music owned or controlled by him; that the rights so transferred comprise a very large proportion of all copyrighted music used in the public entertainment industries of the United States including Florida; that the Society makes use of these rights to enforce upon the public entertainment industries of Florida a blanket license providing for the use of all copyrighted music in the Society's portfolio; that, at least as applied to the radio broadcasting industry, it enforces terms which are harsh and inequitable, and highly discriminatory against radio broadcasting stations not controlled by newspapers.

It will be further shown that the relief sought is directly for the purpose of enabling the Society to maintain its strangle hold upon the public entertainment industries; hence public policy dictates the refusal of such relief by a court of equity, without regard to the question whether, independent of the Florida statute here challenged, such combinations as the Society are forbidden by existing law, state or federal.

III.

All portions of the statute pertinent to the consideration of the instant case represent a constitutional exercise of the police power of the State of Florida.

Under this point of the Argument it will be demonstrated that certain sections of the statute—the ones most attacked by the bill of complaint—viz., Sections 2-A, 2-B and 6, are removed from consideration in the instant case, because, with regard to these sections, no duties are imposed by the Act upon appellants, who, as the prosecuting officers of the State, were the only parties defendant to the action; that the District Court failed to recognize the inapplicability of these sections to the instant suit in its Findings of Fact and Conclusions of law, and this was a controlling factor in the issuance of the injunction. That other sections of the statute attacked by the bill, viz., Sections 7-A, 11-A, and 11-B, involve details of procedure in prosecutions under the Act, which, as there are no such prosecutions at the present time, it is premature to consider in the instant suit; that insofar as the remaining Sections of the Act are attacked by the bill, all such sections represent the constitutional exercise of the police power of the State, directed to the protection of its citizens from the activities of combinations attempting to monopolize public performance rights in copyrighted music.

IV.

The District Court abused its discretion in granting the interlocutory injunction.

Under this point of the Argument it will be shown that there was in the Record before the specially constituted District Court, when it granted the injunction, no showing of a reasonably grounded apprehension of irreparable injury, such as would justify the granting of the injunction; and further, that it does not persuasively appear from any findings of fact and conclusions of law

that the unconstitutionality of the statute is reasonably free from doubt; that in fact no findings of fact and conclusions of law were entered by the District Court until after the granting of the temporary injunction, and after the entry by the defendants below of appeal from such order.

ARGUMENT

I. THE DISTRICT COURT AS A FEDERAL COURT WAS WITHOUT JURISDICTION TO TAKE THE CASE. (Assignment of Errors 1 and 3).

A. No Jurisdiction has been Shown as to Appellee, American Society of Composers, Authors and Publishers.

Before entering into the argument of the point we call the Court's attention to Finding of Fact No. 4 (R 278). The Court finds that the jurisdictional amount involved is \$3000, exclusive of interest and costs, but it does not state how it arrived at that conclusion. And nowhere in the Findings is any reference made to the value of the appellees' business transacted in the State affected by the statute, the extent the statute affects the business, or the cost of operating the appellees' business in the State under the Statute and without the restrictions of the Statute.

The bill of complaint with its exhibits shows that American Society of Composers, Authors and Publishers, (hereinafter referred to as the Society) is an unincorporated association organized under the laws of the

State of New York (Bill, par. 1, R. 2). It is a non-profit organization (Bill, Ex. D. R. 61; Aff. Gene Buck, R. 77).

The money collected by the Society is devoted to the following purposes (R. 61):

"Apportionment of Royalties

Section 1. All royalties and license fees collected by the Society shall be from time to time as ordered by the Board of Directors distributed among its members, provided, however:

(a) That all expenses of operation of the Society and sums payable to foreign affiliated Societies shall be deducted therefrom and duly paid; and

(b) That the Board of Directors, by two-thirds vote of those present at any regular meeting may add to the Reserve Fund any portion not exceeding 10% of the total amount available for distribution; and

(c) That the net amount remaining after such deduction for distribution shall be apportioned as follows: one-half ($\frac{1}{2}$) thereof to be distributed among the "Music Publisher" members, and one-half ($\frac{1}{2}$) among the "Composer and Author" members respectively.

Reserve Fund

Section 2. The Board of Directors, by a two-thirds vote of all those present, shall have the right to create and from time to time to add to the reserve fund, and may direct that a por-

tion of the royalties as and when collected be placed in such reserve fund.

Unclaimed Royalties

Section 3. Royalties which have been apportioned and which have not been claimed by the owners shall remain in the General Fund of the Society for a period of six years. Three months prior to the expiration of said six years, notices shall be given to the parties lawfully entitled thereto, by registered mail, requiring them to receive said royalties within three months, and after the expiration of said three months, such royalties, if not claimed, shall become the absolute property of the Society."

Therefore, if the Society were absolutely prohibited by the statute from doing any business in the State of Florida—which it is not if it ceases its price-fixing activities—it will suffer no loss because the loss, if any, would fall upon its individual members. *KVOS v. Associated Press*, 299 U. S. 269.

In the *KVOS* case a suit was brought in the District Court for the Western District of Washington to restrain a radio station from "pirating" news gathered by the Associated Press and published in the papers of its members, including three papers in the City of Bellingham. It was alleged that the Associated Press was a membership corporation organized under the laws of the State of New York, composed of proprietors or representatives of newspapers throughout the United States. Its business was the collection of news, and the distribution thereof to its members. The cost of the transactions amounted to many millions of dollars a year, and was

equitably distributed among the members of the Associated Press. In addition to these facts, there was a formal allegation that the amount in controversy exceeded \$3000.

The District Court found that it had jurisdiction (9 F. Supp. 279), but decided against the Associated Press on the merits of the action. The Circuit Court of Appeals reversed the District Court and granted a temporary injunction (80 F. (2d) 575). The case was then appealed to this Court, which held that proof as to the jurisdictional amount was insufficient to permit the Associated Press to maintain the action. This Court in its opinion, (299 U. S. 278-279) said:

"The motion (i. e., defendant's motion to dismiss for want of jurisdiction) required the trial court to inquire as to its jurisdiction before considering the merits of the prayer for preliminary injunction. And in such inquiry complainant had the burden of proof. The only attempt to meet that burden is a reply affidavit filed on behalf of respondent, wherein it is deposed 'that the payments made by newspapers for said news sold to them by complainant in the territory served by said radio station is upwards of \$8,000 per month, which is being imperiled and jeopardized by the acts of defendant . . . by its unlawful and wrongful appropriation of complainant's news, and said sum greatly exceeds the sum of Three Thousand Dollars, exclusive of interest and costs, and complainant is in danger of losing said member-

ships and payments if defendant's practices in respect to pirating said news is not enjoined.' This deposition must be read in connection with the statement in the bill that the respondent makes no profit from furnishing news to its members but equitably divides the expense amongst them. The association cannot therefore lose the \$8,000 in question. If the three newspapers in the affected territory cease to pay the sum, they will save it, not lose it, and, as to any other damage they may suffer from petitioner's competition, the affiant is silent.
 * * * * * The respondent having failed to support the allegations as to amount in controversy the District Court should have dismissed the bill."

This point was specifically raised in the instant case by the motion to dismiss (R. 206-7), and the lower Court erred in not dismissing the bill.

Buck v. Case 24 F. Supp. 541, (D.C. W.D. Wash., May 9, 1938) is a case on all fours with the case at bar. In that case the same Gene Buck who is plaintiff in the case at bar, as President of the Society, and other plaintiffs as in the case at bar, brought a suit to enjoin the operation of a statute of the State of Washington which, for purposes of federal jurisdiction, is identical with the Florida statute. A motion to dismiss for want of jurisdiction was filed by the defendant State officers. The three-Judge court, granting the motion to dismiss, said (p. 549):

"The non-profit sharing complainant Society, on behalf of whose members it is claimed the

Bill is filed, has not the requisite amount of pecuniary interest. *KVOS, Inc., v. Associated Press*, 299 U. S. 269-278, 57 S. Ct. 197, 200, 81 L. Ed. 183. The transfer to the Society by the members of their rights for such of the total (less expense) realized from the pooled license fees as a committee of the Society shall determine does not affect the pecuniary interest of the Society."

Appeal is now pending from that decision in this Court.

B. The Jurisdictional Amount as to the Individual Appellees has Not Been Shown.

The allegations of the bill of complaint with reference to jurisdiction as to the individual appellees may be summed up as follows:

That the Appellee, the Society, is an unincorporated society composed of approximately 1000 author and composer members, and 123 publisher members, who write, compose, and publish copyrighted music. (R. 16) That the suit is brought for and on behalf of the Society, by Gene Buck, its President, and by each of the individual Appellees. (R. 2) That the value of each of the publisher members' copyrighted music is in excess of \$1,000,000 (R. 9); that the publisher members of the Society each in 1936 collected over \$50,000 from the Society for licensing their work over the entire world. (R. 32); that the author and composer members named in the bill each collected more than \$5000 in 1936 from the Society for licensing their work over the entire

world (R. 32, 33); that the Society collects for 44,000 affiliated members from foreign countries (R. 21); that during the year 1936 the Society collected, for the use of music of its members and 44,000 affiliated members, from users of said music in the State of Florida, the sum of \$59,306.81 (R. 24); that it will cost the appellees in excess of \$10,000 to operate on a license for each individual piece of music as is required by the Florida law (R. 18).

It will be noted that there is no attempt to break down these figures to show how much each individual appellee received from the licensing of his particular works in the State of Florida. It is not shown what part of the sum of \$59,306.81 received from Florida licenses of the Society in 1936 went to the 44,000 affiliated foreign members. Further, the bill of complaint shows that the publisher, author and composer members have assigned to the Society all their rights to license the public performance for profit in copyrighted music. (R. 16). Thus it appears that the individual appellees have no cause of action at all.

The individual appellees are not prohibited from doing business in this State. They are only prohibited from entering into price-fixing agreements, and the requirement placed in the Act concerning the fixing of a price on each particular composition which covers the right of public performance for profit, and the provision of the Act relating to collecting from the person sending music into the State the license for public performance of the music in the State, are not in controversy in this case, because the appellants have no duties to perform regarding these particular provisions of the Act. But even if the Act independent of its price-fixing prohibition did impose a real burden on appellees, it

has not been shown what the burden would cost the individual appellees as compared to what it costs them now to operate under the present system. Without this essential allegation, the court had no jurisdiction, because in cases of this kind the jurisdictional amount is to be determined, not from the value or net worth of the business which the appellees transact in the State, but from the difference between operating under the burdens of the statute and operating relieved from the regulations of the statute.

In *McNutt v. Gen. Motors Acceptance Corp.*, 298 U. S. 178, the complainant sought to restrain the operation of a statute of the State of Indiana, regulating the purchase of installment contracts. In attempting to establish the jurisdictional amount, the complainant alleged the net worth of its business in Indiana to exceed \$50,000; that it had purchased \$7,000,000 worth of installment contracts in Indiana in the course of a calendar year, and that in the succeeding six months period, it had purchased \$4,000,000 worth. The bill further alleged that the corporation employed in Indiana employees whose aggregate salaries amount to \$150,000, and paid an aggregate office rental of \$13,147.

The complainant rested its allegation as to the jurisdictional amount on these facts, and the further fact that if the statute were put into effect, it would impair the efficiency of the operation and earnings of the complainant. It claimed that the jurisdiction was to be tested by the value of the object to be protected against interference. The Court held that the allegations set forth in the complainant's bill were insufficient to sustain the jurisdiction, and at page 181 said:

"Respondent invokes the principle that jurisdiction is to be tested by the value of the object or right to be protected against interference.

Hunt v. New York Cotton Exchange, 205 U. S. 322; Bitterman v. Louisville & Nashville R. Co., 207 U. S. 205; Berryman v. Whitman College, 222 U. S. 334; Glenwood Light Co., v. Mutual Light Co., 239 U. S. 121; Healy v. Ratta, 292 U. S. 263. But in the instant case, the statute does not attempt to prevent respondent from conducting its business. There is no showing that it cannot obtain a license and proceed with its operations. *The value or net worth of the business which respondent transacts in Indiana is not involved save to the extent that it may be affected by the incidence of the statutory regulation. The object or right to be protected against unconstitutional interference is the right to be free of that regulation. The value of that right may be measured by the loss, if any, which would follow the enforcement of the rules prescribed.* The particular allegations of respondent's bill as to the extent or value of its business throw no light upon that subject. They fail to set forth any facts showing what, if any, curtailment of business and consequent loss the enforcement of the statute would involve. The bill is thus destitute of any appropriate allegation as to jurisdictional amount save the general allegation that the matter in controversy exceeds \$3,000. That allegation was put in issue and the record discloses neither finding nor evidence to sustain it."

So far as the individual appellees are concerned, the bill of complaint can be searched from end to end without discovering any fact from which could be computed

or even inferred the amount received by any individual appellee from the licensing of copyrights owned by him in the State of Florida. In the absence of an affirmative statement as to the amount received by each appellee from the licensing of the public performance of his copyrighted works in the State of Florida, it is obvious that the allegations as to the cost or expense to the individual appellees in conforming to the statute, are insufficient to sustain the jurisdictional amount. In other words, there must be, facts showing first, that the object sought to be protected has a definite value; second, that the cost of conforming to the statute would reduce the value of the business or property affected by an amount equal to or in excess of the jurisdictional amount of \$3,000. To hold otherwise would permit the appellees having an interest of, say, only \$100 each in the subject matter under dispute, to invoke the jurisdiction of the Federal Court by alleging that the cost of conforming to the statute would be in excess of \$3,000. Such a result would destroy the jurisdictional requirement.

C. Appellees Cannot Aggregate their Individual Losses in Order to Make Up the Requisite Jurisdictional Amount.

There was no finding of fact or conclusion of law that the individual complainants had, or had not, the right to aggregate their alleged damages from the operation of the statute so as to comply with the jurisdictional amount, although this point was raised in the motion to dismiss. (R. 276-284 incl.; R. 206).

The rule has been reiterated countless times by the federal courts that the facts demonstrating the value of

the amount in controversy relating to each individual complainant must satisfy the jurisdictional amount, and that there can be no aggregation in order to secure jurisdiction. This rule is well settled in *Wheless v. City of St. Louis*, 180 U. S. 379, at page 382, where this Court, speaking through Chief Justice Fuller, held that separate landowners who sought to attack an assessment could not establish jurisdiction in the Federal Courts by aggregating their assessments.

“The ‘matter in dispute’ within the meaning of the statute is not the principle involved, but the pecuniary consequence to the individual party, dependent on the litigation, as, for instance, in this suit the amount of the assessment levied or which may be levied, as against each of the complainants separately. The rules of law which might subject complainants to or relieve them from assessment would be applicable alike to all, but each would be so subjected or relieved in a certain sum, and not in the whole amount of the assessment. If a decision on the merits were adverse to the assessment each of the complainants would be relieved from payment of less than \$2,000. If the assessment were sustained, neither of them would be compelled to pay so much as that.”

The authorities on this point are exhaustively discussed in the recent case of *Dewar v. Brooks*, 16 F. Supp. 636.

As heretofore demonstrated in the brief, nowhere in the face of the bill can it be ascertained what amounts any of the individual appellees received from the licens-

ing of their works in the State of Florida. The record is entirely blank on this necessary amount. The same fault exists in the showing as to the Society. It affirmatively appears (bill, pa. 26, R. 24, 25) that the amount of \$59,306.81 received in 1936 from licenses to persons using the copyrighted music for profit in the State of Florida, includes not only the amount received by the Society on behalf of its members, but also the amounts received on behalf of all of the foreign authors, composers, and publishers, with whom the Society has working agreements. The bill fails entirely to allege facts showing that either the individual appellees or the Society, exclusive of the foreign groups which are not here parties complainant, received anything in 1936 from the licensing of public performance of their copyrighted works in this State.

The cause of action alleged by the Appellees in the bill of complaint is not a joint one. See *Buck et al v. Kloeppel*, reported in 10 Fed. Supp. p. 345, wherein Judge Strum said:

"Where copyright proprietors of musical compositions seeking injunction against future infringements of separate and distinct copyrights owned by them severally, in none of which the several copyright proprietors had any joint or common interest, were joined as plaintiffs with society suing as assignee to recover damages for past infringements of such copyrights, misjoinder of parties plaintiff resulted and bill was dismissible as multifarious (17 USCA § 25, 27; Equity Rules 26, 37, 38 (28 USCA § 723))."

See also the case of *Pope et al v. Blanton, County Judge, et al*, 19 F. Supp. pp. 15 and 18 respectively.

One of the writers of this brief drew the bill in this suit and in the first case attempted to show jurisdiction by alleging a joint cause of action. However, as the court will see from the opinion by the late Judge Bryan, the motion for interlocutory injunction was denied because no jurisdiction was shown, due to the fact that it was not shown that each defendant had suffered or did suffer the requisite jurisdictional amount of damages.

Thereafter, an amended bill was filed in which it was attempted to show jurisdiction by alleging a joint interest and the division of the profits by all the plaintiffs after sale of their sponges through the unincorporated sponge exchange. The allegation as to this particular feature is set out by Judge Long on page 19 of the opinion and is as follows:

“By the amended bill, plaintiffs undertake to show that property rights are involved; that the damages are irreparable, and that jurisdiction attaches in order to prevent a multiplicity of suits; that plaintiffs have large investments in boats and other equipment; that their boats and other equipment are used in gathering sponges by the method of diving; that the boats are of a value greater than \$3,000 each, that those other than the owners are employed on the boats; that they are dependent upon this employment for a livelihood; that their sales through the sponge exchange amount to some \$300,000 yearly; that the profits are distributed among them; that in excess of 50 per cent of the

sponges are gathered from 5 to 10½ miles off the shore of Taylor County; that off the shore of this particular county the sponges grow more rapidly and are more easily gathered than any other place; that because of the acts of defendants, plaintiffs will suffer irreparable damage unless defendants are restrained from enforcing the Florida statute prohibiting the taking of sponges by the diving method a distance of three leagues from the shore line."

Judge Long apparently thought that the plaintiff had shown jurisdiction and decided the case on the merits against them. However, when this case came to this Court, (299 U. S. 521), the decree of Judge Long was reversed, because the requisite jurisdictional amount had not been shown, the Court saying:

"The decree of the District Court is modified and the cause is remanded with directions to dismiss the bill for want of jurisdiction by reason of the absence of the requisite jurisdictional amount. *McNutt v. General Motors Corp.*, 298 U. S. 178, 80 L. Ed. 1135, 56 S. Ct. 780; *KVOS v. Associated Press*, 299 U. S. 269, ante 183, 57 S. Ct. 197."

Certainly, if in the Pope case, *supra*, there was no jurisdiction for the federal court to decide the issues, there cannot be in this case. The mere fact that the suit is brought by Gene Buck as President of the American Society of Composers, Authors, and Publishers, does not make that society a party to the suit; but even if it did, still there would be no jurisdiction, because the Society, according to the allegations in the bill of complaint,

is an unincorporated, non-profit association, and according to the highly rhetorical affidavits filed in support of the motion for interlocutory injunction an eleemosynary one; thus, the society in itself, can suffer no loss. The loss would have to fall directly on the members thereof. This is indisputably settled by the case of *KVOS v. Associated Press*, supra.

In this aspect of the jurisdictional question, also, appellants' contention is directly supported by *Buck v. Case*, supra, the Court saying (pp. 549-550):

"Concerning the aggregating of the claims of the members of the complainant Society in determining the amount in controversy, neither practice nor rule of the committee concerning the apportioning among the Society's members of the pooled license fees realized is shown. It appears to be a part of the contention made by the defendants that such division is inequitable and to the advantage of those directly concerned with the management of the affairs of the Society. It also appears that such distribution may be of license fees secured throughout the country rather than from within the State. A common interest among the members warranting an aggregating of their claims for such purpose has not been shown."

D. The Suit is Not One Arising Under the Copyright Laws.

We again call the court's attention to the fact that the only sections of the Act with which these appellants are concerned are Sections 1 and its dependent Sections

3, 4-A, 4-B, 5-A, 5-B, 7-A, 7-B, 8 and 9. The prosecuting officers have no duties to perform with respect to any of the remaining sections, that is, the sections that require the price of the music, including the right to publicly perform it for profit, to be affixed to the music before it is sold, and the section requiring persons transmitting music into the State where it is publicly performed for profit to pay all fees required by the owner thereof, and relieving the user of the music in this State from any liability for using the music in this State. There is no criminal liability imposed on persons violating Sections 2-A, 2-B, and 6, nor any civil liability with which the appellants in this case are charged with imposing or attempting to impose. Therefore, it is clear that with these sections of the law not under consideration, there is no question of copyright law involved in this suit. The suit does not involve the validity of any copyright or the infringement thereof, but merely rights incidental to the copyright laws, in that the property interest of the complainants is a creature of such laws as in *Albright v. Teas*, 106 U. S. 613.

For further discussion of this question, see Point III, Division C (1) (2) of this brief.

E. The Claim that the Statute Violates Foreign Treaties Presents no Substantial Federal Question.

In so far as the plaintiffs, allege a violation of treaty rights (bill, par. 24, R. 21, 33), by reason of mutual working arrangements with foreign society of composers and authors, suffice it to say that the plaintiffs cannot, because of these mutual working arrangements with foreign societies, claim any violation of *their own*

treaty rights. If there is any conceivable violation of a treaty right, it is a violation of a treaty right of a foreign composer or author, and not of plaintiffs.

If any point of constitutional law is settled, it is that one cannot raise constitutional questions for other persons.

Heald v. District of Columbia, 259 U. S. 114;
Arizona Copper Co., v. Hammer, 250 U. S.
 400;

Walker v. Gish, 260 U. S. 447;

Lehon v. Atlanta, 242 U. S. 53;

Oliver Iron Mining Co., v. Lord, 262 U. S. 172;

"The federal right claimed to raise a federal question must be that of the plaintiff and not a third person."

Simkins Federal Practice, (1934) Sec. 458, p. 401 and cases cited.

One can only raise a constitutional question where and to the extent that he is personally affected by the application of the statute or some section thereof.

Heald v. District of Columbia, 259 U. S. 114;
Dahnke Walker Co., v. Bondurant, 257 U. S.
 283, 289;

Panama R. Co., v. Johnson, 289 Fed. 964; affirmed 264 U. S. 374;

Yazoo & Miss. R. Co., v. Jackson Vinegar Co., 226 U. S. 217;

Oliver Iron Mining Co., v. Lord, 262 U. S. 172.

The principle is succinctly stated in *Dahnke-Walker Co., v. Bondurant*, 257 U. S. 282, 289, as follows:

"Besides, a litigant can be heard to question

a statute's validity only when, and so far as, it is being or is about to be applied to his disadvantage."

The underlying reason for the above rule is that courts are loathe to pass on constitutional questions and will do so only where absolutely essential, and only at the instance of one who is injuriously affected by the application of the alleged unconstitutional act under a state of facts absolutely requiring a decision on the constitutional question, and then only to the extent that the state of facts alleged requires such a decision. A court will not pass on the validity of any section of a statute, where the facts before it do not inescapably require a decision on such section; but will pass by such question until facts are presented requiring a decision.

Blair v. United States, 250 U. S. 273, 279;

Massachusetts v. Mellon, 262 U. S. 447, 488.

Under the foregoing rules, nearly all of the questions raised in the complaint fall by the wayside, and cannot be raised in this case.

And certainly the Society's claim based on the treaty rights of others with whom it has "mutual working arrangements" presents no substantial federal question, vesting a federal court with jurisdiction of this cause to determine such question.

II. THE COURT SHOULD NOT LEND ITS AID IN THE FURTHERANCE OF THE MONOPOLISTIC POWER OF THE PLAINTIFFS. (Assignment of Error 2).

In view of the monopolistic power which the record discloses is vested in the Society, even if the Court be-

low had jurisdiction as a Federal Court to entertain this case, and even if the Federal Anti-Trust Acts, the Anti-Trust statutes of the State of Florida (Laws of Florida 1915, Vol. I p. 281 amended by Laws of Florida 1925, Vol. I p. 517) and the statutes now under consideration do not prohibit the Society from maintaining this suit, still under the rule of public policy against monopolies, the District Court should not have lent its equitable aid to further the monopolistic powers of the Society. The maxims: "He who comes into equity must come with clean hands" and "*ex turpe causa non oritur actio*", should govern.

The thought is that what the plaintiffs seek in this case is the aid of the court in fastening permanently upon the State of Florida the strangle hold which already they have acquired upon all entertainment industries dependent on copyrighted music. Appellants expect here to show:

(A) That the Society as now constituted is a price-fixing, combination operating in restraint of trade.

(B) That public policy demands it be not aided in maintaining the monopoly it now enjoys.

A. The Plaintiff Society is a Price-Fixing Combination Operating in Restraint of Trade.

At the present time there are approximately 123 publisher members of the Society, and approximately 1,000 writer and composer members (bill, par. 17, R. 16), and an additional 44,000 composers, authors, and publishers, who are represented by the plaintiff Society by virtue of its agreements with foreign societies (bill, par. 20, R. 18) all of whom bound themselves together for

the declared purpose of fixing prices for the right to publicly perform their music for profit (R. 20). A "vast reservoir" of copyrighted musical compositions is thus created (ibid.), and the sale or licensing of the right to publicly perform those compositions is concentrated in the Society, thereby suppressing all competition between the respective copyright owners.

It is important to note that with rare exceptions the copyright owner of musical compositions is the publisher and not the composer and author. The Bill of Complaint specifically alleges with respect to each of the individual plaintiffs that the copyrights have been vested in the publishers (bill, par. 8, R. 8; par. 9, R. 9; par. 10, R. 9; par. 11, R. 10; par. 12, R. 11; par. 13, R. 12; par. 14, R. 13). Moreover, Exhibit "A" attached to the bill (R. 36) expressly transfers all rights, including performance rights, to the publisher and we must accept that exhibit as being representative of all agreements between composers and authors and their respective publishers. Consequently the plaintiffs' repeated reference to composers and authors in such manner as to imply that they are now the copyright owners should be totally disregarded. The legal rights of composers and authors are limited to rights for an accounting.

On or about March 4, 1930, plaintiff Gene Buck, appeared before the Committee on Patents, House of Representatives, 71st Congress, Second Session, in connection with Hearings on HR 9639, a Bill to amend the Federal Copyright Act, and amongst other things stated: (Hearings before Committee of Patents, page 5.)

Mr. Buck. . . . In former times they have told you about the American Society—a terrific,

monopolistic chimera that was just going to take the Victor Co., and the motion picture industry right out of business. Let us put the cards on the table and see what the American Society is. *The American Society is an organization which consists of all the authors and composers, and their publishers in America* brought together because in the year 1914 my dear beloved friend, Victor Herbert, found that a restaurant on Broadway was taking one of the numbers from his opera; having a person in costume come out with an orchestra and sing his song without asking Herbert's permission, and making a covert charge. * * *

In March of 1932, the plaintiff Buck, as President of the plaintiff Society, at page 213, Hearings before Committee on Patents, 72nd Congress, First Session, HR 10976, a Bill to amend the Copyright Act, made the following statement to the Committee on Patents in contradiction of a statement made by Mr. Frank Boland, Counsel of the American Hotel Association:

"Mr. Boland: The American Society of Composers, Authors and Publishers, I believe—I may be wrong—does not control much more than one-half of the popular music.

The Chairman: Why, Mr. Buck told me they control 95 per cent.

Mr. Buck: The copyrighted works.

The Chairman: Can you prove that to me?

Mr. Buck: Yes.

The management of the plaintiff Society is vested exclusively in a self-perpetuating board of directors, con-

sisting of twenty-four persons, twelve of whom represent publishing members, six represent composer members, and six represent author members. Each director is elected to served for a period of three years, and is eligible for re-election upon the expiration of his term. The terms of office of eight members of the board expire each year, and their successors are elected annually by the remaining members of the board. The directors have exclusive and absolute control of the management and of all activities of the Society, and appoint all committees, officers, and employees (bill, Exhibit D, "Articles of Association", Art. IV, Sec. 1, and Art. V. Secs. 1 and 2; R. 52, 53).

It may be readily seen from the foregoing that the power of plaintiff Society for good or evil is in the hands and under the domination of twenty-four individuals whose election to the board is not dependent upon the vote of the membership of the Society, but upon the vote of their fellow directors.

Amongst the powers of this self-perpetuating board of directors is the power "to fix the rate, time and manner of payment of royalties for the performance of all works registered with the Society." (bill, Exhibit D, "Articles of Association", Art. V, Sec. 2; R. 53, 54).

The plaintiff Society issues to businesses using music only blanket licenses conferring upon the user the right to publicly perform for profit, all of the copyrighted musical compositions in the vast reservoir pooled in the Society. (bill, par. 20, R. 18; par. 23, R. 20) and the single license fee is "fixed and determined by the Society". (bill, par. 23, R. 20).

That this power can be and is used by the plaintiff Society to discriminate between competing businesses requiring the performance of copyrighted musical compositions for their continued existence is clearly demonstrated by the provisions of the form of contract granted to radio broadcasting stations owned and operated not less than 51 per cent by a newspaper (Contract of Radio Station WDAE attached to affidavit of L. S. Mitchell, R. 243). It is not surprising that the plaintiffs neglected to attach the form of this contract as an exhibit to their complaint; and that they neglected to state in the voluminous affidavits in support of their motion for a preliminary injunction the number of such discriminatory contracts which they have issued.

A comparison of Radio Stations WFLA and WDAE (see Affidavits of W. Walter Tison, R. 212, and L. S. Mitchell, supra,) both located in the City of Tampa, Florida, discloses that each station operates on the same power, caters to the same potential listening audience, and that each competes with the other for the radio advertising business of Tampa and environs. Yet Radio State WFLA is compelled by the terms of its license agreement to pay 5 per cent of its gross income derived from the sale of its facilities, whereas Station WDAE only pays the percentage of its income on such as is derived from musical programs using copyrighted music controlled by the plaintiff Society. Moreover, even this percentage is not 5 per cent, but is 3 per cent on the first \$25,000 of income derived from programs using Society music and 5 per cent on the income above that amount derived from such programs.

Accepting as true for the sake of this discussion Mr. Buck's very elaborate description of the efforts of radio

broadcasters to combat the demands of the Society, the mere fact that the Society is able to discriminate between the only two radio stations in Tampa is glaring testimony to the monopolistic price-fixing power vested in the plaintiff Society by the mutual contracts of its members.

Further testimony of this power is disclosed by the affidavit of W. Walter Tison and by the complete "Report on Copyright" of the National Association of Broadcasters, dated February 12, 1936, quoted in part by plaintiff Buck in his affidavit (R. 90). (See complete "Report on Copyright" attached to affidavit of W. Walter Tison, R. 217). This report discloses that on January 1, 1936, the music publishing companies Harms, Inc., Remick Music Corporation, M. Witmark and Sons, and several others, all owned by Warner Brothers Picture Corporation, withdrew from membership in the plaintiff Society with the intention of independently licensing public performance rights in the musical compositions owned by them. The report discloses that prior to January 1, 1936, approximately 40 per cent of the copyrighted musical compositions performed by broadcasting stations were controlled by the Warner subsidiaries. Nevertheless in spite of the loss of this large quantity of copyrighted music, the plaintiff Society refused to reduce the license fee demanded by it for the copyrights remaining under its control; and the broadcasting stations, in spite of their efforts to avoid doing so, were compelled to accede to the demands of the Society and accept the depleted repertory of the plaintiff Society at the same price which should have been paid for the complete repertory. The attempt of the Warner subsidiaries to operate independent of the plaintiff So-

ciety apparently failed since they rejoined the Society on August 1, 1936.

The fact that no radio station or other user of music has been able to obtain a complete or even substantially complete catalogue of the copyrighted musical compositions coming under the plaintiff Society's license (Aff. of W. Walter Tison, R. 215) places the burden of determining the ownership of a copyrighted composition upon the user. Such being the case, the license agreement between the plaintiff Society and the user really amounts to no more than an agreement not to sue the user for infringement. Checks of copyrighted musical compositions entered by the members of the plaintiff Society and by the members of foreign Societies affiliated with plaintiff Society in the office of the Register of Copyrights, Washington, D. C., indicate that approximately 60% of all published copyrights in the United States are under the control of the Society. Manuscripts, as distinguished from published copyrights, are not generally available to a user of music for public performance purposes since manuscripts are not offered for sale. Therefore, they do not become available for the use of the general public until such time as they are published. (Aff. of W. Walter Tison, R. 215). The total published copyrights between January 1, 1909 and December 31, 1936 represent approximately 508,000 plus an additional number of renewals during the same period of 60,682 (Photostat copy of Certificate of Register of Copyrights attached to Affidavit of W. Walter Tison, R. 241). Consequently it appears that the plaintiff Society probably controls the performance rights of between 350,000 and 400,000 copyrighted musical compositions.

This overwhelming array of uncontradicted facts proves the monopolistic activities of the Society in respect of the very matters it has put in litigation by its bill of complaint. All of it was before the Court, but was completely ignored in its Findings of Fact and Conclusions of Law (R. 276-284). If the Court had considered these facts it is difficult to believe that it would have given equitable relief to the plaintiffs.

Not only does the state have power to regulate the use of a federal copyright within the state, such regulation being in no way prevented by the federal copyright laws, but it must also be borne in mind that the federal copyright laws are not intended to and do not sanction every conceivable practice in which the owners of such copyrights or combinations of owners of such copyrights may seek to engage.

The Florida statute challenged by plaintiffs primarily is directed at monopoly and monopolistic practices of the owners of copyrighted musical compositions. It is a regulatory statute which prescribed the "rules" under which the property right may be sold within the State of Florida. It does not deny the existence of the property right nor does it destroy that property right.

The copyright Act of 1909 does not give the copyright owner the right to control or dominate business dependent upon the public performance of a large quantity of music for existence. It gives to the copyright owner only the right to control and dominate the use of the individual musical composition covered by the individual copyright. It gives no right to impose restrictions or limitations upon the use of other musical compositions. It gives no right to combine with other copyright owners

for the purpose of increasing the power of the individual monopoly created by the copyright in the individual copyrighted musical composition. If such right to combine with other copyright owners were created by the Copyright Act, then a combination of a sufficient number of copyright owners would have the right to take over or prevent others from engaging in any and all businesses which are dependent upon music for their economic existence. If the owners of copyrights may lawfully combine at any time and lawfully enforce their collective demands upon such businesses, then the legislature of a state can do nothing to protect its citizens from such combinations.

We are dealing here with a combination of conditions, with interlocking restrictions imposed by a powerful group of copyright owners, and not with legal and reasonable conditions imposed independently and in the normal and usual course of business by the owner of one copyright upon the use of the individual musical composition covered by that copyright.

The cases in which the question as to whether property rights created by statute may be pooled by the individual owners of such rights have principally arisen in connection with patents. However, the Supreme Court has definitely determined that the monopoly created by the Copyright Act is no more extensive than that created by the Patent Act. In *Straus v. American Publishers Association*, 231 U. S. 222, at pages 234-235, Mr. Justice Day says:

“So in the present case, it cannot be successfully contended that the monopoly of a copyright is in this respect any more extensive than

that secured under the patent law. No more than the patent statute was the copyright act intended to authorize agreements in unlawful restraint of trade and tending to monopoly, in violation of the specific terms of the Sherman Law, which is broadly designed to reach all combinations in unlawful restraint of trade and tending because of the agreements or combinations entered into to build up and perpetuate monopolies."

In view of the express language of the Court in the Straus case, the question of the right to pool the individual property rights created by the patent statute or the copyright statute is identical, and the decisions involving patents are applicable to the situation under discussion.

In *Standard Sanitary Manufacturing Co., v. United States*, 226 U. S. 20, 49, it is stated:

"* * * Rights conferred by patents are indeed very definite and extensive, but they do not give any more than other rights an universal license against positive prohibitions. The Sherman Law is a limitation of rights, rights which may be pushed to evil consequences and therefore restrained."

In *Virtue v. Creamery Package Mfg. Co., and the Owatonna Mfg. Co.*, 227 U. S. 8, it is stated by Mr. Justice McKenna (p. 32):

"Of course patents and patent rights cannot be made a cover for a violation of law, as we

said in *Standard Sanitary Manufacturing Company v. United States*, 226 U. S. 20."

In *National Harrow Co., v. Hench*, 83 F. 36, 38, a suit involving the right of the manufacturers of float spring tooth harrows to assign all their patents to the National Harrow Company, the Circuit Court of Appeals for the Third Circuit, said:

"The fact that one patentee may possess himself of several patents, and thus increase his monopoly, affords no support for an argument in favor of a combination by several distinct owners of such property to restrain manufacture, control sales, and enhance prices. Such combinations are conspiracies against the public interest and abuses of patent privileges. The object of these privileges is to promote the public benefit, as well as to reward inventors. The suggestion that the contract is justified by the situation of the parties—their exposure to litigation—is entitled to no greater weight. Patentees may compose their differences, as the owners of other property may, but they cannot make the occasion an excuse or cloak for the creation of monopolies to the public disadvantage."

In *Standard Oil Co., (Indiana) et al v. United States*, 283 U. S. 163, 174, Mr. Justice Brandeis used the following language:

"Where domination exists, a pooling of competing process patents, or an exchange of licenses for the purpose of curtailing the manufacture and supply of an unpatented product,

is beyond the privileges conferred by the patents and constitutes a violation of the Sherman Act. *The lawful individual monopolies granted by the patent statutes cannot be unitedly exercised to restrain competition."*

The most recent decision on the subject of the concerted action of a group of copyright owners is contained in *United States v. Interstate Circuit, Inc., et al*, 20 F. Supp. 868, 872, 873, 874, 875.* This was a suit instituted by the United States against the above named defendants and the principal moving picture producers and distributors to enjoin certain provisions of the exhibition contracts entered into by the owners of the two theatre chains and the producers and distributors. The defendants contended that the subject matter of the contracts consisted of copyrighted motion picture films and that they had certain rights as copyright owners. The following language of Judge Wm. Howley Atwell clearly states the limitations imposed upon copyright owners in the licensing of the property right created by the Copyright Act, and the rights of individuals dealing with such copyright owners:

"It must be conceded that since films are copyrighted, the owner thereof has the right, under our laws, to exhibit them, or, to license their exhibition, at such prices, or in such manner as

*Remanded by this Court with directions to District Court to state its Findings of Fact and Conclusions of law as required by Equity Rule 70½ (*Interstate Circuit, Inc., v. United States* U. S., decided April 25, 1938).

to him may seem appropriate. This well defined right, however, will not justify his agreeing, or, combining with another person in order to deprive a third person of a complete freedom of contract. The copyright statute * * and the anti-trust statute * * are both in effect and vitally necessary. *Straus v. American Publishers Ass'n.*, 231 U. S. 222.

* * * * *

"The citizen has the right to go to another citizen to make a contract and to have that other citizen free from any inhibiting prior agreement to limit the rights of him who seeks. The subsequent small theatre exhibitor who wanted the right to show a class A film at ten or fifteen or twenty cents, has a right—that right which belongs to every free man—to contract with the owner of that film, free to exercise his own judgment. This evidence shows that no such subsequent run exhibitor had a field of that sort with the distributor defendants. There had already been a pre-occupation of this very field of agreement. Some of his rights had already been taken away from him. It differs from the exercise of the distributor of the right to refuse to deal at all."

Applying Judge Atwell's language to the situation under consideration, every business in the United States performing copyrighted musical compositions for a profit is entitled to go to every copyright owner and make a contract with that copyright owner individually, and that copyright owner should be free from inhibiting

prior agreements which limit the rights of the user who seeks to deal with him. Under the mutual agreements entered into by the members of the plaintiff Society, the Society is vested with the exclusive right to license the copyrights of all its members. As heretofore pointed out, the bill admits that the Society issues only a blanket license at a fee fixed and determined by the Society acting in behalf of all of its members.

"Price-fixing" is the classic example of violations of anti-trust laws, both federal and state. It may reasonably be said that almost without exception it is the basic purpose behind combinations which create dictatorial powers by pooling their respective properties. Plaintiff Gene Buck admits that license fees are "fixed and determined by the Society, acting on behalf of all its members and members of affiliated societies" (Buck Aff., R. 77) and that only blanket licenses covering all the copyrights of the Society's members and affiliates are issued. The user is required to buy the right to perform the entire repertory of all the members and affiliates of the Society at an annual fee fixed and determined by the Society and is not permitted to acquire the right to perform merely those copyrights which are required in his business. The fact that these prices so fixed and determined by the Society have been impressed upon every broadcasting station and motion picture theatre in Florida and upon hotels, dance halls, night clubs and other businesses in the state in spite of the efforts to resist, so eloquently described by plaintiff Buck and others in their affidavits herein, is convincing testimony of the power to dominate which has been concentrated in the Society.

Indeed it has come to be recognized that where price fixing exists in what normally would be a competitive market, no further proof of monopoly is necessary. That the price actually fixed is reasonable is not a defense since it is the *power* to fix prices which constitutes the monopoly, and it necessarily includes the power to control and dominate, since it logically follows that if the group does not have the power to control and dominate, then it could not have the power to fix prices.

The fullest enunciation of this doctrine by the Supreme Court is found in *United States v. Trenton Pottery Co., et al*, 273 U. S. 392. In that case, it was denied that there was sufficient evidence that the defendants had combined to fix prices and to limit sales in interstate commerce. It was urged "that the court below erred in holding in effect (1) that the trial court should have submitted to the jury the question whether the price agreement complained of constituted an unreasonable restraint of trade; * * *". The trial court had urged that the jury "might return a verdict of guilty without regard to the reasonableness of the prices fixed, or the good intentions of combining units * * *" and refused requests that the acts done did not constitute violations "unless it was also found that they unreasonably restrained interstate commerce". Against the argument that the "rule of reason" should be applied, the trial court had instructed the jury that " * * * the law is clear that an agreement on the part of the members of a combination controlling a substantial part of an industry, upon the prices which the members are to charge for their commodity, is in itself an undue and unreasonable restraint of trade and commerce; * * *". In the Circuit Court of Appeals the judgment of the District Court was reversed, but in the

Supreme Court the Circuit Court of Appeals was reversed, and the charge to the jury by the trial court sustained. The Court observed that in the *Standard Oil and Tobacco* cases a requirement that restraints be "unreasonable" was laid down, and then continued:

"* * * But it does not follow that agreements to fix or maintain prices are reasonable restraints and therefore permitted by statute, merely because the prices themselves are reasonable (396).

"* * * The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices (397-398).

"* * * It has since often been decided and always assumed that uniform price fixing by those controlling in any substantial manner a trade or business in interstate commerce is prohibited by the Sherman Law, despite the reasonableness of the particular prices agreed upon (398)."

This case was approved in *Standard Oil Co., v. United States*, 283 U. S. 163, 169, and again in *Appalachian Coals, Inc., v. United States*, 288 U. S. 344, 375. In the latter case, the Court referred to its decision in the *Trenton Potteries* case and said:

"It was found that they had the power to do this and had exerted it. The defense that the prices were reasonable was overruled, as the court held that the power to fix prices involved 'power to control the market and to fix arbitrary

and unreasonable prices', and that in such a case the difference between legal and illegal conduct could not 'depend upon so uncertain a test' as whether the prices actually fixed were reasonable,—a determination which could 'be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies' ”.

In an unreported decision of Judge August Hand in the Southern District of New York in the case of *United States v. Consolidated Music Corp., et al*, (decided February 27, 1922) it was held that an agreement of six music publishers requiring the manufacturers of music rolls to use two of the compositions of each of the six each month in manufacturing rolls for player pianos, paying therefor an established price of 12 cents per word-roll, was a violation of the Sherman Law. It was found that these six publishers controlled one-fourth of the substantial publishing business in that type of music, and the Court said:

“ * * * The fixing of a minimum of 12 cents was in itself a violation of the Sherman Act.

* * * Such an arrangement was in my opinion a sufficient restraint of competition to be unreasonable under the general rules laid down by the Supreme Court in construing the Sherman Act.”

(Note that “unreasonable” is applied to restraint of competition and not price fixing.)

That the power to fix royalties is tantamount to the power to fix prices was definitely decided by the Supreme Court in 1931 in *Standard Oil Co. (Ind.) et al v. United*

States, supra. This was a suit involving the rights of the owners of the Standard Oil Company of Indiana, the Texas Company, the Standard Oil Company of New Jersey and the Gasoline Products Company to pool their respective patents covering the production of gasoline by the "cracking" process. It was claimed by the defendant that their patents were overlapping and that their sole object was to avoid litigation and losses incident to conflicting patents. Although the ~~Supreme Court~~ ultimately found that no monopoly or power to effectively control prices resulted and therefore that the Sherman Act was not violated; it nevertheless passed upon certain other defenses and upon certain other contentions, restating rules for determining questions of violation of the Sherman Act. Among these rules is that pertaining to the power of combining potent owners to fix royalty rates as being tantamount to the power to fix prices. On page 174 of the opinion, Mr. Justice Brandeis stated:

"The rate of royalties may, of course, be a decisive factor in the cost of production. If combining patent owners effectively dominate an industry, the power to fix and maintain royalties is tantamount to the power to fix prices."

With specific reference to this power to fix and maintain royalties and the fact that such power is tantamount to the power to fix prices, Mr. Justice Brandeis says in Note No. 9 at the bottom of page 174:

"Where the royalty demanded is a fixed percentage of the gross sales price, this relationship is clear."

It is submitted that the foregoing is on all fours with the situation under discussion. The mere fact that the combining copyright owners in the Society have actually impressed upon the radio industry their demands for a fixed percentage of the gross income of the station (less advertising agency commissions) which gross income represents the sales price of time on the air for advertising or other purposes, is conclusive evidence of their power to dominate industries dependent upon music for economic existence and is conclusive of the fact that by combining their performance rights they have created in the Society the power to fix and maintain royalties, i. e., the power to fix prices.

The bill and the affidavits filed in support of the motion for a temporary injunction, while purporting to attack the constitutionality of the Florida Statute, really constitute to a considerable extent a plea in avoidance of the monopolistic price-fixing practices engaged in by the plaintiff Society. The plaintiff Buck in his affidavit in support of the motion for the preliminary injunction describes attempts of users, both organized and unorganized, to combat the collective demands of the Society. The mere fact that such attempts have uniformly failed over a long period of years is eloquent testimony of the power concentrated in the defendant Society and the domination which it can exercise over entertainment industries by reason of its price-fixing activities.

Undoubtedly the Society engages in lawful activities such as policing for the purpose of detecting infringements. Undoubtedly the blanket method of licensing at an annual fee "fixed and determined by the Society" is the easiest and simplest method for the members of

the Society to function, but such a method contravenes anti-trust legislation, and the public policy which lies behind it.

It may well be that through its 23 years of experience the Society has evolved that method of operation which is most efficient and to it most desirable. It might be assumed for the purpose of argument that its manner of operation is that which most benefits both producers and users of music. Nevertheless, speaking with respect to Federal legislation, Congress has decreed through a monopolistic pooling, there is a violation of law, and arguments about efficiency and benefits are of no avail. State legislatures have decreed the same.

In *Eastern States Retail Lumber Dealers' Assoc., v. United States*, 234 U. S. 600, 613, the Court was confronted with an agreement providing for the distribution of trade information. In holding that there was a violation of the Sherman Law, it said:

"The argument that the course pursued is necessary to the protection of the retail trade and promotive of the public welfare in providing retail facilities is answered by the fact that congress, with the right to control the field of interstate commerce, has so legislated as to prevent resort to practices which unduly restrain competition or unduly obstruct the free flow of such commerce, and private choice of means must yield to the national authority thus exerted. *Addyston Pipe Co. v. United States*, 175 U. S. 211, 241, 242."

To like effect see *Duplex Printing Press Co., v. Dear- ing et al*, 254 U. S. 443, 467-468.

Thus the Supreme Court has held that acts which violate the provisions of the Sherman Law may not be justified because of economy or intended benefit in particular cases. It is no defense to the Society, if in fact it is violating the Anti-Trust Laws, or the public policy which stands behind those laws, to say that its method of operation is expeditious as far as it is concerned and beneficial as far as others are concerned.

And it cannot be successfully argued that experience has demonstrated that, despite possible conflict with Anti-Trust Laws, the plan of operation now in effect is the only practicable one. *United States v. Great Lakes Towing Co.*, 208 F. 733 (C.C.A. 6). In that case, Circuit Judges Warrington, Knappen and Dennison, of the Sixth Circuit, holding the Great Lakes Towing Company a combination in violation of the Anti-Trust Act, said in part, on page 744 of the opinion:

"The fact that the towing and wrecking service has been improved under the towing company's administration cannot legalize the combination if otherwise unlawful. Not only do good motives furnish no defense to a violation of the Anti-Trust Act (*Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20; 33 Sup. Ct. 9; 57 L. Ed. 107), but we have no right to assume that the unsatisfactory conditions existing in 1899 could not have been eliminated by lawful and normal methods."

It is elementary that the lawfulness or unlawfulness of a combination does not depend on the motive or primary intent of the parties forming it when the question involves a result already accomplished by the activities

of the combination. Good motives and good primary intent in such cases are not legal defenses, otherwise the Anti-Trust Laws would in fact be a nullity. The law presumes that the members of the combination intended the result accomplished and the Supreme Court has long since set at rest any thought to the contrary.

Standard Sanitary Mfg. Co., v. United States,
226 U. S. 20;

United States v. Trans-Missouri Freight Assn., 166 U. S. 290, 340;

Anderson v. Ship Owners Association of Pacific Coast, 272 U. S. 359, 400;

Thomsen v. Cooper, 243 U. S. 66, 86;

Bedford Cut Stone Co., v. Stone Cutters Assn., 274 U. S. 37, 55.

B. Public Policy Demands that the Court Give no Aid to Plaintiffs in the Present Suit.

The principle for which defendants here contend is based on the maxim that "he who comes into equity must come with clean hands." The situation here fits the limitation of the rule as stated in 1 *Pom. Eq. Jur.* (3d Ed.) Sec. 399:

"The maxim, considered as a general rule controlling the administration of equitable relief in particular controversies; is confined to misconduct in regard to, or at all events connected with, the matter in litigation, so that it has in some measure affected the equitable relations

subsisting between the two parties, and arising out of the transaction; it does not extend to any misconduct, however gross, which is unconnected with the matter in litigation, and with which the opposite party has no concern."

It is freely conceded that even those attempting to perpetuate a monopoly do not thereby become general outlaws to such extent that they may not have recourse to courts of justice. In numerous cases the courts have permitted such monopolistic combinations to recover on contracts which do not form a part of the monopolistic plan. In the case at bar, however, it is self-evident that the relief sought is for the express purpose of perpetuating the monopolistic plan under which the plaintiffs now operate. In fact the bill has no other object. In the court below, far from disputing this statement, plaintiffs asserted in their brief (p. 22):

"In the case at bar the injury to the collective rights of the complainants is undisputed, certain and inevitable. *The Society must abandon all its contracts with its licensees in the State because they are expressly declared unlawful and are nullified by Section 3 of the Statute.*"

The equitable maxim is directly applicable to one who invokes the aid of a court of equity in enforcing or protecting an agreement in unreasonable restraint of trade or tending to monopoly. 1 *Pom. Eq. Jur.* (3d Ed.) Sec. 402, citing:

American Biscuit Co. v. Klotz, 44 F. 721;

Pacific Postal Tel Cable Co. v. Western Union Tel Co., 50 F. 493;

Chicago Gas Light Co. v. Gas Light Co., 121;

Ill., 530, 13 N. E. 169, 2 Am. St. Rep. 124.

In *American Biscuit & Mfg. Co. v. Klotz*, supra, Klotz had sold his bakery in New Orleans to American Biscuit Co., in exchange for stock of the company. Under the agreement Klotz became manager of the plant. Charging that certain frauds had been perpetrated upon him with regard to the stock paid for his sale of the plant, Klotz repudiated the contract and held possession of the bakery adversely to the Biscuit Company, excluding them from the premises. The Biscuit Company brought suit for injunction and receiver. Klotz defended by answer and cross bill asking for rescission of the contract.

After announcing that the equities for the appointment of a receiver under such circumstances ordinarily would be with the plaintiff, the Court declined to do so (p. 723) because of:

“* * * an aspect of the case originally suggested by the defendant, when the case was pending in the state court, apparently abandoned here, but sufficiently brought to our notice by the exhibits of both parties.”

The court then points out that the evidence discloses an “attempt to monopolize” within the meaning of the Federal and Louisiana statutes against monopolies (p. 725), and that:

“*Aside from this the complainant's business, even if lawful, being of the kind shown above, is not of that meritorious kind that it should be encouraged by a court of equity. The appointment of a receiver by a court of equity is not a matter of strict right but of judicial discretion.*”

Because of these considerations the Court denied the appointment of a receiver.

This case was never appealed, but it has been frequently cited, and in *McConnell v. Camors-McConnell Co.* (C.C.A. 5, 1907), 152 F. 321, the syllabus of the Klotz case is quoted and the holding followed.

In the *McConnell* suit *supra*, the Circuit Court of Appeals denied to the plaintiff (a subsidiary of United Fruit Co.) the right to judicial aid in enforcing a contract, the purpose of which was to aid in bringing about a monopoly of foreign commerce in tropical fruits. In a strongly worded opinion by Circuit Judge McCormick, the Court said (p. 332):

"The state may and will bring, in its courts, actions and suits to enforce its statute laws and its public policy against them, when necessity requires, to the extent that time and opportunity permit. But the harvest is great, the laborers are few, and time is short. These parties are wonderfully strong. Age does not impair their strength. They perennially recruit it from the highest ranks of the legal profession, with veteran experts in strategy and tactics, both grand and elementary. There are necessary delays in litigation, inherent weaknesses in its best machinery, obstructions will supervene, and all these elements are capitalized to the last extent, of their earning capacity, by these highly organized unnatural persons, who decide and act with the promptness and prescience of the most superior human intellect. Direct proceedings by the state are overtaxed. The courts, especially

the courts of equity, should not pose always as the fabled goddess, but keep an eye single to these exigent conditions and aid the state, as they rightly may, by withholding help or grace from graceless and hurtful dealings."

In *Continental Wall Paper Co. v. Lewis Voight & Sons Co.* (C.C.A. 6, 1906) 148 F. 939, plaintiff sued for money due for wall paper sold and delivered to defendants. The appeal was based on the action of the trial court in sustaining against demurrer a special defense that "the goods sued for were sold to it under certain agreements in aid of restraint of trade. In sustaining the ruling of the lower court, the opinion (by Judge Lurton, later Mr. Justice Lurton of this Court) said (p. 950):

"The defense which we sustain here is not for the sake of William Voight & Sons. The averment that they paid 50 per cent. more for their gross purchases in consequence of the illegal combination has little merit in it, moral or otherwise. They doubtless sold again at the great minimum profit they agreed to exact from retailers, and the retailers later exacted the undue profit from the consuming public. There, at last, like all burdens, it must rest. The defense here sustained is good only because it is only possible to protect the public by refusing all assistance in carrying out an illegal agreement."

This decision of the Circuit Court of Appeals was affirmed by this Court, 212 U. S. 227. The Court, speaking through Mr. Justice Harlan, said (p. 262):

"In such cases the aid of the court is denied, not for the benefit of the defendants, but because public policy demands that it should be denied without regard to the interests of individual parties."

To like effect see *Chicago, M. & St. P. Ry. Co. v. Wash, St. L. & P. Ry. Co.* (C.C.A. 8, 1894); 61 F. 993.

In *McMullen v. Hoffman*, 174 U. S. 639, two bidders for a municipal contract had secretly agreed that while ostensibly putting in separate bids, if either were awarded the contract, its benefits should be shared equally between them. The suit was for an accounting against the successful bidder after he had declined to pay his confederate the latter's alleged share of the profits. After a full analysis of the facts and authorities bearing on the subject, this Court, held that the cause of action, arising as it did out of a contract in restraint of trade, could not give rise to any enforceable rights in favor of the plaintiff.

It should be noted that a defense of violation of the anti-trust laws is not available in an action for infringement of a copyright. This is vastly different from the assertion, as a result of such a holding, that the activity of the one holding the copyright is not in violation of the anti-trust laws. Indeed, even though the complainant in a suit to enjoin infringement is admittedly violating the Sherman Act, that defense is not available.

Vitagraph, Inc., et al v. Grobaski, 46 F. (2d) 813, 814;

Witmark & Sons v. Past Time Amusement Co., 298 F. 470, 480;

Harms et al v. Cohen, 279 F. 276, 280.

Therefore, the application of the "clean hands" maxim to plaintiffs thus mis-using their copyrights should appeal with great force to the equitable discretion of the Court.

III. ALL PORTIONS OF THE STATUTE PERTINENT TO THIS CASE ARE CONSTITUTIONAL. (Assignment of Error 10).

Foreword

Before proceeding with the consideration of this question it is necessary to point out that the statute, while enacted as a single piece of legislation, in reality covers one main subject and several others which are quite disconnected with the main subject. The main subject dealt with is the prevention of unlawful monopolies and restraints of trade in the public performance for profit of copyrighted music in the State of Florida.

This main purpose is clearly declared in section 1, and by reference to that section, forms also the subject of sections 3, 4-A, 4-B, 5-A, 5-B, 7-A, 7-B, 8, 9.

As will be shown in a detailed analysis which follows, Sections 2-A, 2-B, 2-C and 6 belong in a special category because they deal with subjects unrelated to the main purpose of the Act. As there shown, the state enforcement officers, defendants in the court below, have no duties to perform with reference to these sections, and the same thing is true of sections 10-A and 10-B, which deal only with the rights of private parties to maintain actions under the statute.

Sections 7-A, 11-A and 11-B deal solely with procedural details, the consideration of which appellees' bill of complaint has attempted prematurely to invoke.

Section 12 is merely the usual "saving clause" declaring that the invalidity of any portion of the Act shall not affect the validity of the remainder.

Section 13 is likewise a general clause declaring the rights and remedies therein provided to be cumulative to those already existing.

The attacks made by the bill upon the constitutionality of the statute are confusingly worded, for the most part without sufficient identification of the sections to which they relate, and are endlessly repetitive. Hence, it will be more convenient to answer them in dealing with specific sections of the statute below.

A. The validity of Sections 2-A, 2-B, 2-C, 6, 10-A and 10-B of the statute cannot be considered in this proceeding, because the defendant state enforcement officers have no duties to perform with reference to those sections.

The importance of this point it would be difficult to overestimate, for, upon a careful reading of the bill, it is seen that the larger portion of plaintiffs' complaint against the statute is founded upon sections 2-A, 2-B, and 6. See notably the following paragraphs of the bill: par. 7 (R. 5); par. 25 (R. 23); par. 28 (R. 26); par. 29 (R. 27); par. 31 (R. 28).

This point was urged upon the District Court, but the court failed in its "Findings of Fact and Conclusions of

Law" to make this all important differentiation between the sections of statute involving duties of the defendants and those not involving such duties (R. 276-284). This fallacious conception of the scope of the act is strikingly illustrated in Findings 5 and 6, which are based solely on the operation of Sec. 2-A and 2-B of the Act.

If, as appellants contend, these sections of the statute require no duties of them, and present merely questions for determination in civil suits between the owners of public performance rights in copyrighted music and those who are claimed to be infringing upon such rights, then this case will be indeed vastly simplified.

Section 2-A (see Appendix 1) in substance provides that all authors, composers and publishers selling any musical composition in Florida in whatever form published, printed, manufactured or prepared for use must cause to be specified thereon its selling price; that when a purchaser acquires the composition and pays the specified selling price, the purchaser may render or permit to be used or rendered such composition by players, orchestras, bands, radio apparatus, electrical transcriptions, music records or otherwise, either privately or publicly without further license fees or exactions, the initial selling price being deemed to be full compensation for all such renditions.

Section 2-B provides that if any author, composer or publisher fails to affix the selling price on a musical composition and collect the same in the time and in the manner provided in Section 2-A, then any person in Florida who has purchased such composition may use it for private or public performance for profit without further license fee and shall be free from lia-

bility in any infringement or injunction suit or suits instituted by the copyright proprietor.

Section 2-C declares that it is not the purpose of the statute to give any purchaser of copyrighted musical compositions the right to resell, copy, publish or vend; nor to prevent authors and publishers from determining the price to be charged for the use or rendition of their copyrighted musical compositions, if they act independently of such a combination as described in Section 1 of the statute, a section which will be later discussed in this brief.

Section 6 deals with radio stations, theaters, moving picture houses and similar places of entertainment in Florida which are affiliated with concerns outside of the State originating the performance of copyrighted music, whether the original rendition of such music is by radio sound production instrumentalities or by furnishing persons to sing or play such music in the state. With respect to such concerns it places the entire responsibility and liability for the use of copyrighted music upon the affiliate outside the state who originates the broadcast or other performance. It forbids the owner from suing for copyright infringement, loss or damage within this state because of the Florida performance, remitting him to make his collection from the outside affiliate.

None of these four sections of the statute lays any duty whatever upon the Attorney General of Florida or his co-defendants, the State's Attorneys. Instead, each of them merely attempts to define the consequences of certain conduct of omission or commission on the part of the copyright owner as releasing a Florida performer of the musical composition from liability to such owner.

In the case of sections 2-A and 2-B, the omission to affix the price upon the musical compositions sold in Florida is declared to bring about the release of liability on the part of the Florida performer. Section 2-C is legislation in favor of the copyright owner, for it forbids the Florida performer from reselling, publishing or vending the composition.

Section 6 places upon the copyright owner the responsibility of so selecting the radio broadcasting chain and the theatrical and musical performance syndicates with whom he does business that he will be enabled to collect from them if such performances are rebroadcasted or otherwise reproduced in Florida.

Let us now see whether elsewhere in the Act any duties are cast upon these appellants with respect to these sections of the statute, bearing in mind always, that the object of the suit is to enjoin persons occupying state offices from performing duties cast upon them by a law claimed to offend against constitutional guaranties.

The key to the duties of the appellants is found in section 9, which reads as follows:

"Section 9. The several Circuit Courts of this State shall have jurisdiction to prevent and restrain violations of this Act, and, on the complaint of any party aggrieved because of the violation of any of the terms of this Act anywhere within this State, *it shall be the duty of the State's Attorneys in their respective circuits, under the direction of the Attorney-General, to institute proceedings, civil or criminal or both, under the terms hereof, against any combina-*

tion as defined in Section 1 hereof, and against any of its members, agents or representatives as herein defined, to enforce any of the rights herein conferred, and to impose any of the penalties herein provided, or to dissolve any such combination as declared unlawful by Section 1 hereof. In civil actions such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of have been duly notified of such petition, the Court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the Court may at any time make such temporary restraining order as shall be deemed equitable."

By the language emphasized above it plainly appears that the duty of the Attorney General and State's Attorneys is to proceed only against combinations declared unlawful in Section 1 of the statute and the members, agents, or representatives of such unlawful combinations. By no stretch of the imagination can it be said that those who fail to put prices on their musical compositions sold in Florida (Sections 2-A and 2-B), or those who try to collect license fees from Florida broadcasters reproducing music rendered outside the state by a national hookup, are declared to be an unlawful combination as defined in Section 1. Any attempt by state prosecuting officers to visit civil or criminal proceedings upon copyright owners under the terms of Sections 2-A and 2-B or 6 would be so palpably without color of law as to afford the defendants ample remedy by habeas corpus or other summary procedure.

By order of this Court the present incumbent in the office of Attorney General of Florida has been made a party to this suit. It will be borne in mind that section 9 of the statute places him in supreme charge of all criminal and civil enforcement procedure. By this brief he evidences his construction of the law to be that there is no occasion for the activities of the Attorney General or the State's Attorneys with reference to these sections of the statute. With this construction placed upon the law by the chief law officer of the state, how can it be said that the plaintiffs stand in danger of losing the rights granted them by the copyright act because of any action of the appellants under sections 2-A, 2-B or 6? Surely, as to these sections there is no need for an injunction.

Conversely, the correct procedure for testing the rights of the copyright owners or those holding public performance rights under them is apparent upon a mere perusal of these sections of the statute. If a copyright owner fails to affix a price upon his composition sold in Florida and it is thereafter publicly performed for profit by the purchaser, the owner has only to bring the usual infringement suit. If the defendant in the infringement suit pleads the Florida statute, an issue is at once made in the federal court concerning the constitutionality of that provision, and it will be assumed that the federal court will fully protect all rights granted the owner by the copyright act, notwithstanding any state enactments to the contrary.

In any such case the constitutionality of the section of the state statute would be appropriately tested in a federal court, in a civil action. In no such case does

the Florida statute lay upon these appellants the duty to enforce any criminal or civil penalties upon the copy-right owner in respect of such a proceeding.

The barest inspection of Sections 10-A and 10-B shows them to be likewise entirely foreign to any duties of the state enforcement officers. Section 10-A gives the right to any person in the State of Florida aggrieved by reason of anything forbidden in the Act to recover damages, including attorney's fees. Section 10-B provides that in the event of the failure of the state prosecuting officers to bring proceedings as directed by the Act, then such proceedings may be brought by any aggrieved party proceeding in his own behalf and that of other parties similarly situated.

So far as we are advised, appellees do not contend that these sections are involved in the present proceeding, and they are mentioned here solely to complete our analysis of the statute.

B. The Consideration of the Constitutionality of Sections 7-A, 11-A and 11-B is prematurely invoked in the Present Proceeding.

SECTION 7-A. This section provides that any person, firm or corporation within this state who acts as representative for an unlawful combination as defined in section 1 is declared an agent for the service of process against the combination.

Obviously, this section deals purely with a question of procedure, and it is prematurely raised in the instant suit when no action, civil or criminal, is pending against

anyone (Aff. Landis, R. 211). When and if a suit is brought and an attempt is made to serve someone as the Florida representative of such combination, it will be presumed that the Florida court will give due consideration to any proper attack made against the validity of the service. Even if it failed to do so, surely this court cannot be asked now to assume that the Florida Supreme Court would improperly affirm the lower court; and further to assume that if the Florida Courts did adjudicate the question erroneously, this Court, in the exercise of its appellate jurisdiction regarding federal questions, would indulge in the error committed by the Supreme Court of Florida.

In *Cavanaugh v. Looney*, 248 U. S. 453, this Court was asked to consider the constitutionality of a statute of the State of Texas empowering the regents of the state university to condemn lands for university purposes. In affirming the decree of the District Court refusing to enjoin the operation of the statute, this Court said (pp. 456, 457):

"Nothing indicates that any objections to the validity of the statute could not be presented in an orderly way before the state court where defendants intended to institute condemnation proceedings; and if by any chance the state courts should finally deny a Federal right, the appropriate and adequate remedy by review here is obvious."

No comment could be more appropriate to the present situation.

SECTIONS 11-A AND 11-B. These are the sections requiring defendants in actions brought under the statute

to produce documentary evidence. These sections are subject to the same comment as made above with respect to Section 7-A and, for the reasons there stated, consideration of their validity is premature at the present time.

In addition, it must be noted that the defendant is not bound to produce anything until the court has made an order requiring it. Surely it cannot be presumed that the court to whom application is made will exercise its authority arbitrarily or unreasonably or in defiance of constitutional provisions protecting against self-incrimination and unreasonable searches and seizures! Should the court fail in the first instance to afford defendant this protection, there is no clause in the act prohibiting the defendant from filing his motion to suppress the evidence, and thus due process would be afforded. A well known illustration of this corrective power of a court is found in the case of *Gouled v. United States*, 255 U. S. 298, where this Court held that at the trial of one charged with crime the court should have considered defendant's objection that certain of the government's documentary evidence was obtained in violation of the Fourth and Fifth Amendments to the Federal constitution; even though an earlier motion for the return of the papers to the defendant had been denied.

The penalty provided for failure to comply with the court's order is \$100 per day for each day of default, a figure which does not appear drastic or unreasonable as applied to an organization transacting the vast business portrayed by the plaintiffs in their bill. The procedure in the Florida courts with respect to proceedings for contempts not committed in the presence of the court

is by rule requiring the respondent to show cause why he should not be committed. *Palmer v. Palmer*, 28 Fla. 295, 9 So. 657. Answer being made to the rule, respondent is then given ample opportunity to defend himself against the charge; and here again, it should not be assumed that the court would impose a penalty for failure to obey an order made in disregard of respondent's constitutional rights.

C. Section 1 of the statute and its Dependent Sections 3, 4-A, 4-B, 5-A, 5-B, 7-B, 8 and 9, represent a valid exercise of the police power of the State of Florida in the Prevention of Monopoly and Unreasonable Restraints of Trade.

The perusal of these sections of the statute shows clearly the dependence of Sections 3, 4-A, 4-B, 5-A, 5-B, 7, 8 and 9 on Section 1, for the provisions of each of these sections are by express language conditioned upon Section 1.

If Section 1 falls, all must fall. If Section 1 is good, as appellants now expect to demonstrate, the affiliated sections will likewise be good as against the main attack, leaving to be dealt with only such special challenges as have been asserted against those particular sections.

SECTION 1. This section strikes the keynote of the whole statute. It declares unlawful any combinations of authors, composers, publishers, or owners of copyrighted music, constituting a substantial number of persons owning such copyrighted compositions in the United States—if the object of such combination is to declare or fix license fees or other compensation for the use or rendi-

tion of copyrighted music for private or public performances for profit.

It forbids the collection of license fees so fixed by such combination from any person, firm or corporation within the State of Florida, including radio broadcasting stations, theatres, moving picture houses, hotels, restaurants, clubs, dance halls, et cetera; forbids the collection of such collection fees in any Court within the State; makes any such collection of attempted collection a separate offense; denounces such price fixing as in restraint of trade, and declares the collection or attempted collection to be an intra-state transaction.

SECTION 4-A. Relieves all radio broadcasting stations in Florida from payment of any license fee for the use of copyrighted music owned or controlled by an unlawful combination as defined in Section 1.

SECTION 4-B. Provides that if a broadcasting station in Florida is affiliated with a station outside Florida, which broadcasts musical compositions to be rebroadcast within the State under the affiliation agreement, then the outside broadcaster is forbidden to collect from the Florida broadcaster any license fee for the purpose of paying it to an unlawful combination as defined in Section 1.

SECTIONS 5-A AND 5-B. Are the exact counterparts of Sections 4-A and 4-B, respectively, except that they deal with theatres, moving picture houses, and similar places of entertainment and amusement instead of radio broadcasting stations.

SECTION 7-B. Makes any person negotiating or attempting to collect license fees for an unlawful combina-

tion, as defined in Section 1, a part of the combination and subject to the penalties of the Act.

SECTION 8. Provides penalties for any unlawful combination or other person attempting to act within this state in violation of the terms of the Act and for any agent of a person who aids or attempts to aid an unlawful combination.

SECTION 9. Grants jurisdiction to the Circuit Courts of Florida to prevent and restrain violations. It requires the State's Attorneys *under direction of the Attorney General* to institute proceedings, civil, criminal, or both, against any unlawful combination as defined in Section 1, its members, agents, or representatives. Civil actions are to be instituted by petition, and the Court is given power to issue temporary restraining orders as deemed equitable.

The attack levied against Section 1 (bill, pars. 7, 26, 30, 32, 35; R. 5, 24, 28, 29, 30), so far as it may be determined from the extremely general language in which the bill is couched may be simplified into the following*:

- (1) That the section constitutes an unlawful interference with the Federal Copyright Act;
- (2) That it is an unreasonable and arbitrary exercise of the police power;

*The "Findings of Fact and Conclusions of Law" entered by the 3-judge court *long after the granting of the order for injunction* (R. 276-284) follows substantially the same line of attack. [The "Memorandum Opinion" filed with the order for injunction (R. 269) stated only that "there is grave doubt of the constitutionality of the Act", without specifying any reasons].

(3) That it denies to plaintiffs the right of access to the federal courts;

(4) That it operates extra-territorially;

(5) That it violates the "equal protection of the laws" clause by discriminating against holders of musical copyrights, leaving others kinds of copyrighted property unaffected.

(6) That it is too indefinite to support the penal provisions.

These points will be discussed in the order stated:

(1) (2) *Section 1 does not constitute an unlawful interference with the federal Copyright Act, but is a lawful exercise of the State's police power.*

These two points we discuss together, for the one is the corollary of the other.

In defining what is an unlawful invasion by a State of the province of Congress, it is well settled that where Congress has exercised a constitutional power by legislating on a subject in such manner as to show an intention to cover that subject completely, then the State is blocked from entering that field. Conversely, when Congress has the power but has seen fit not to exercise it then the State is free to act.

Carey v. South Dakota, 250 U. S. 118, 122;

Savage v. Jones, 225 U. S. 501, 533;

M. K. & T. Ry. Co., v. Haber, 169 U. S. 613, 623.

Now so far as concerns physical articles which are the subjects of inter-state commerce, Congress has legislated against restraints of trade by the Sherman Anti-

trust Act and other legislation; and with reference to such articles, the monopoly granted to the copyright or patent owner by federal statute may not be used as a tool to assist him in accomplishing an unreasonable restraint upon interstate commerce.

Straus v. American Pub. Ass'n, 231 U. S. 222.

Standard Sanitary Mfg. Co., v. United States,
226 U. S. 20.

It cannot be doubted that Congress, if it saw fit to do so, could make similar regulations forbidding the use of intangible copyright rights so that they might not be used as weapons in aid of monopoly. Should it do so, the field would be pre-empted, and no State might act. But Congress has not seen fit to do this; hence the field is open to the State so long as it does not trespass upon the rights which Congress has definitely conferred upon the owner.

In the instant case the regulation made by the State statute does not interfere with any right granted him as an individual by the copyright act. Notwithstanding the passage of this Act, the owner may continue freely to deal with it as an individual and may license it to whomsoever he pleases, either in whole or in part, and may exact therefor whatever consideration may be agreed upon. It is only where a large number of copyright owners band together to fix prices and, in effect, to deprive Florida users of their freedom to trade that the Florida statute interferes.

The copyright clause of the Federal Constitution (Art. I, sec. 8 (8)) gives Congress the power to secure to authors the right to "their respective writings". Can

it be doubted that the word "their" as thus used is to be taken in a distributive sense? If so, what is promised to each author, is that he shall have the benefit of *his own writing*—not of someone else's writing.

But, to determine this problem we are not remitted to these general considerations, for this Court has repeatedly committed itself to the doctrine that the state, in the exercise of its police power, may enact reasonable regulations affecting commercial dealings in patents and copyrights within its borders:

Allen v. Riley, 203 U. S. 347;

Patterson v. Kentucky, 97 U. S. 501;

John Woods & Sons v. Carl, 203 U. S. 358;

Ozan Lumber Co., v. Union County National Bank, 207 U. S. 251;

Carbice Corp., v. American Patents Corp., 283 U. S. 27, 33, foot-note;

Fox Film Corp., v. Doyal, 286 U. S. 123.

In *Allen v. Riley*, *supra*, 203 U. S. 347, it was held that while a state may not pass any law prohibiting the sale of patents for inventions or nullifying the laws of Congress regulating their transfer, a state has the power, until Congress legislates on the subject, to make such reasonable regulations in regard to the transfer of patent rights as will protect its citizens against fraud; and a requirement of the statute of Kansas that before the sale or barter of patent rights, an authenticated copy of the letters patent and the authority of the vendor to sell the right patented shall be filed in the office of the clerk of the county within which the rights are intended to be sold, is not an unreasonable regulation by the state.

This Court said (203 U. S. 352):

"It is asserted by the plaintiffs in error that the subject of the sale or assignment of the whole or any part of an interest in a patent is derived from the laws of Congress passed with reference to the constitutional provision quoted above, and that any regulations whatever, by any state authority in regard to such assignment or sale, and making provision in respect to them, are illegal."

That is precisely the contention here: that because the Society enjoys the rights of public performance under these copyrights any regulation as to how they may be used in Florida is illegal.

The Court further said (pp. 355, 356, 357):

"We think the State has the power (certainly until Congress legislates upon the subject) with regard to the provisions which shall accompany the sale or assignment of rights arising under a patent *to make reasonable regulations* concerning the subject, calculated to protect its citizens from fraud. And we think Congress has not so legislated by the provisions regarding an assignment contained in the act, referred to.

"... Possibly Congress might enact a statute which would take away from the States any power to legislate upon the subject, but it has not as yet done so. *It has simply provided that every patent or, interest therein, shall be assignable in writing, leaving to the various states the power to provide for the safe-guarding of the interests of those dealing with the assumed owner of a patent, or his assignee.* To deal with

that subject has been the purpose of the acts passed by the various States, among them that of the State of Kansas, and we think that it was within the powers of the State to enact such statute . . . The mere provision in the Federal statute for an assignment and its record as against subsequent purchasers, etc., is not such legislation as takes away the rights of the States to legislate on the subject themselves in a manner neither inconsistent with nor opposed to the Federal statute."

Is there any difference in substance between a regulation which covers *frauds as to the ownership* of a patent, and one which covers, as this one does, the use of public performance rights to enforce an unreasonable restraint on trade, a monopoly?

In the lower court appellees filed a brief in which they quoted with approval the following excerpt from the opinion in the Allen case (p. 356):

"The act must be a reasonable and fair exercise of the power of the State for the purpose of checking a well-known evil and to prevent, so far as possible, fraud and imposition in regard to the sales of rights under patents. Possibly Congress might enact a statute which would take away from the States any power to legislate upon the subject, but it has not as yet done so. It has simply provided that every patent, or interest therein, shall be assignable in writing, leaving to the various States the power to provide for the safe-guarding of the interests of those dealing with the assumed own-

er of a patent, or his assignee. To deal with that subject has been the purpose of the acts passed by the various States, among them that of the State of Kansas, and we think that it was within the powers of the State to enact such statute. *The expense of filing copies of the patent and the making of affidavits in the various counties of the State in which the owner of the rights desired to deal with them is not so great in our judgment as to be regarded as oppressive or unreasonable, and we fail to find any other part of the act which may be so regarded.* Some fair latitude must be allowed the States in the exercise of their powers on this subject. It will not do to tie them up so carefully that they cannot move, unless the idea is that the States have positively no power whatever on the subject."

Appellants welcome a joinder of issue on this excerpt.

Is this Florida statute a "reasonable and fair exercise of the power of the State for the purpose of checking a well-known evil"? Let it be left to plaintiffs' bill to answer that question. Here are 123 music publishers (R. 16) and 1000 American authors and composers, who pool their public performance rights in all copyrighted music owned by them, armed with the American rights of 44,000 foreign authors and composers, for the purpose of fixing prices of public performance rights in Florida and elsewhere. To be admitted to their association is an act of grace (R. 51, 52); and the affairs of the association are administered by a self-perpetuated Board, which fixes license fees based on the right to use not less than the entire portfolio of music, (R. 52, 20)

and distributes the net profits among each class of its membership as it sees fit (R. 58). When to this are added the additional facts that the association controls performance rights on approximately 60% of the published copyrights in the United States (aff. W. Walter Tison, R. 215), and that the license fees are fixed according to the arbitrary discretion of the Board, *bearing most oppressively on radio stations not 51% owned by a newspaper* (R. 243)—then it is small wonder the Legislature of Florida decided it was time to act!

In *John Woods & Sons v. Carl*, 203 U. S., 358 the Supreme Court, following the Allen case, *supra*, held that a state statute was valid which rendered void any promissory note, if given for a patent right, if the note does not show on its face for what it was given.

In *Ozan Lumber Co., v. Union County National Bank*, 207 U. S. 251, the court followed the two previous cases, and again held the Arkansas statute valid as against the claim that it was unconstitutional because it excepted from its provisions "merchants and dealers who sell patented things in the usual course of business."

In *Patterson v. Kentucky*, 97 U. S. 501, a leading case on the right of the State to regulate the use of patent rights, the court held that the state may prohibit the sale of dangerous oils, even when manufactured under a patent from the United States. This Court said (pp. 503, 505, 506):

"It is true that letters-patent, pursuing the words of the statute, do, in terms, grant to the inventor, his heirs and assigns, the exclusive right to make, use, and vend to others, his invention or discovery, throughout the United

States and the Territories thereof. *But obviously this right is not granted or secured, without reference to the general powers which the several States of the Union unquestionably possess over their purely domestic affairs, whether of internal commerce or of police.* 'In the American Constitution system', says Mr. Cooley, 'the power to establish the ordinary regulations of police has been left with the individual States, and cannot be assumed by the national government.' Cooley, Const. Lim. 574. . . .

" We are of opinion that the right conferred upon the patentee and his assigns to use and vend the corporeal thing or article, brought into existence by the application of the patented discovery, must be exercised in subordination to the police regulations which the State established by the statute of 1874. It is not to be supposed that Congress intended to authorize or regulate the sale, within a state of tangible personal property which that state declares to be unfit and unsafe for use, and by statute has prohibited from being sold or offered for sale within her limits.

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"These considerations, gathered from the former decisions of this court, would seem to justify the conclusion that *the right which the patentee or his assignee possesses in the property created by the application of a patented discovery must be enjoyed subject to the com-*

plete and salutary power with which the States have never parted, of so defining and regulating the sale and use of property within their respective limits as to afford protection to the many against the injurious conduct of the few."

In *Carbice Corp., v. American Patents Corp.*, 283 U. S. 27, 33, footnote, Mr. Justice Brandeis, speaking for the court, said:

"Nor does the grant of a United States patent exempt the patented product from limitations imposed by state police statutes. *Patterson v. Kentucky*, 97 U. S. 501; *Allen v. Riley*, 203 U. S. 347; *John Woods & Sons v. Carl*, 203 U. S. 358; *Ozan Lumber Co., v. Union County National Bank*, 207 U. S. 251."

In *Fox Film Corp., v. Doyak*, 286 U. S. 123, the court held that copyrights are not federal instrumentalities; that they are like patents; that a copyright is a right exercised by the owner during the term at his pleasure and exclusively for his own profit, and forms the basis of extensive and profitable enterprise; that in creating the right Congress did not reserve to the United States any interest in the production itself or in the copyright, or in the profits therefrom; that the mere fact that a property right is created by a federal statute to fulfill a governmental purpose does not make it non-taxable by a state when it is held in private ownership and exercised for private advantage, and that *therefore a statute of Georgia imposing a license tax, measured by gross receipts of royalties within the state, on the "business of licensing copyrighted motion pictures"* engaged in by a New York corporation *was a valid state statute.*

Measured by these decisions, the State of Florida was well within its rights when it enacted this statute forbidding the sale in Florida of public performance rights of copyrighted music placed in a combination for price fixing purposes.

As a part of plaintiffs' attack on the statute as an abuse of the police power, it is charged in the bill (pars. 26, 29; R. 24, 27) that it will deprive them of the means of detecting infringements, and fixing license fees, because the cost of operating independently of the Society would exceed the amount which each of the plaintiffs would receive from his Florida operations.

The fact that plaintiffs may find the regulation oppressive, that it may increase their labor and decrease the value of their property does not invalidate the regulation. II *Cooley's Const. Lim.* 1228.

But after all, the statute is not factually open to this attack.

There is not a word in it which would interfere with these or similar beneficial activities, if dissociated from the price-fixing monopolistic operations. Apart from such unlawful operations, there would be nothing in section 1 or any other part of the statute to forbid the owners of public performance rights in copyrighted music to use the Society, or any other organization, as a clearing house for information to assist the owners in prescribing reasonable license fees, as licensing agent to execute contracts with Florida users of the music for profit, as collecting agent to collect fees, or as investigating agent to detect infringements and to assist in prosecuting them.

With the vast fund of information and experience at its command, there can be no doubt that the Society could perform lawfully a useful and beneficial function alike to the owners of the performance rights, to the Florida entertainment and amusement industries and to the public which they serve, with proper apportionment of the costs among foreign and American owners.

We submit that the lengthy and dismal prophecies of disaster to the publisher and composer plaintiffs contained in the bill of complaint and in their highly rhetorical affidavits are without substantial basis of fact so far as concerns those parts of the statute with which this Court is now concerned.

(1) Section 1 and its dependent sections do not attempt to deprive the Federal Courts of Jurisdiction.

The language of the statute claimed to give rise to this implication is found in sections 1 and 3: in section 1:

“ * * * and such license fees or other exactions by such combination or its agents, member, or interested parties shall not be collected in any Court within the boundaries of this State * * * ”

In section 3:

“All existing contracts, agreements or licenses now existing within this State, made by any person, firm or corporation with any combination declared unlawful under Section 1 hereof, are hereby declared void and non-enforceable in any Court within this State, * * * ”

Plaintiffs completely disregard the well-defined rule of statutory construction that, where broad terms are used in a statute, a legislature is presumed to be legislating only with respect to those things which are within its legislative jurisdiction. Frequently the term "any Court" has been used, both in state and federal legislation, yet the statutes have been upheld as constitutional.

In the early case of *Wells v. Central Vermont R. R. Co.*, 29 Fed. Cas. 643, 644, Sec. 3224 U. S. Rev. Stat. was involved. This section provided that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." The court stated that, taken literally, these words would prohibit such a proceeding in state courts as well as in federal courts, then said:

"But Congress has no control over state courts in respect to taxes, and it is *not to be presumed that it intended to reach beyond where its power extended*, but to the contrary; and, therefore, that broad construction cannot prevail."

In *Colby v. Cleaver*, 169 F. 206, 208-209, an Idaho statute required foreign corporations to comply with certain conditions before doing business within the state, and declared that no contract made in the name or for the use or benefit of a non-complying foreign corporation, could be sued on or enforced in "*any court of this state*". It was held that this limitation should be construed as applicable only to courts under the jurisdiction of the legislature, and that it was not intended to preclude the corporation from resorting to the Federal courts in Idaho to enforce a mortgage on land in that state.

In *Shaw v. Meyer-Kiser Bank* (1927), 199 Ind., 687 it was held that the words "any court wherever situated" as used in an Indiana statute relating to mortgage of real estate by the guardian of a ward, did not empower the court of a sister state to take jurisdiction over real estate titles in Indiana, even though the court of the sister state followed the statutory procedure.

Reynolds v. Enterprise Transportation & Transit Co., 198 Mass., 590, 85 N. E. 110, 112, involved a Massachusetts statute which provided that an attachment of property on mesne process should be dissolved by the appointment of a receiver to take possession of the property by "any court of competent jurisdiction in this commonwealth". The statute further provided that, when an attachment had been so dissolved the receiver should not be discharged until all the assets in his hands had been fully distributed, or the claim upon which the attachment was made had been fully paid. It was held, that the words "any court of competent jurisdiction in this commonwealth" meant any court subject to the legislation of the commonwealth, and that the statute did not apply to receivers appointed by federal courts. Obviously, there is no difference between the phrase "any court in this commonwealth" (Massachusetts) and "any court within the boundaries of this state" (Florida) or "any court within this state" (Florida). Clearly the words "of competent jurisdiction" in the Massachusetts statute are of no consequence here, meaning only such courts as have power to appoint receivers.

In the absence of words incapable of any other construction, this Court will not assume that the Florida

Legislature "intended to reach beyond where its power extended" (*Wells v. Central Vermont R. R. Co.*, supra).

(2) Section 1 and its dependent sections are not void because of the alleged charge of extra-territorial operation.

The bill alleges (R. 30) that the defendants will enforce said statute against the complainants "when they enter into license agreements without the State of Florida with the residents or citizens of that State for the right or license to perform publicly for profit the musical compositions of the complainants and others similarly situated within the State of Florida". Also (R. 26), "complainants will be able to license users of their music in Florida without doing any act in said State; but unless the injunction prayed for herein is granted complainants will be unable to issue any licenses without the State of Florida without incurring the penalties of said State's statute."

Therefore the question is squarely presented—May the State of Florida by legislative enactment make it a criminal offense for the complainants to execute license contracts outside of Florida, which contracts are to be performed within the State of Florida and penalize the complainants, or their agents, who are guilty of such offense when they are found within the jurisdiction of Florida?

This Court has held the general rule to be that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done and not by the law of the country where the contract for the performance of the act is executed.

Thus, in *American Banana Co., v. United Fruit Co.*, 213 U. S. 347; acts done by the United Fruit Company in Costa Rica (p. 355, 356) were held without the scope of the Sherman Act.

Likewise this Court has held that the State of Michigan may punish a person for acts done in the State of Illinois with the intention to produce, and producing, detrimental effects within the State of Michigan *even though such person had never set foot in Michigan until after the crime was committed.*

Strassheim v. Daily, 221 U. S. 280.

It is obvious that if the rule were otherwise a state would be seriously handicapped, if not rendered helpless, in protecting its citizens from, and preventing, acts which the State Legislature has branded as criminal. The case at bar is an excellent example of what the result would be were the rule otherwise than that stated above. In the case at bar the Legislature of the State of Florida has placed its stamp of disapproval upon, and declared criminal, the monopolistic activities such as those engaged in by the Society by declaring its license agreements or license contracts to be unlawful. If the State of Florida is without the power to restrain the Society from performing in Florida its contracts *executed outside* the State, then such practices will continue to flourish in the State of Florida notwithstanding the Legislature's condemnation thereof.

In *Strassheim v. Daily*, *supra*, Daily had been convicted of procuring Armstrong, a public official of Michigan, to pay bills presented to the State which Armstrong knew to be fraudulent. It was objected that dur-

ing the whole period during which the crime was committed Daily was in Chicago, *Illinois*, and could not be punished under an indictment found in *Michigan* for such offenses. The Supreme Court denied this objection and approved the conviction saying (p. 285):

"If a jury is to believe the evidence and find that Daily did the acts that led Armstrong to betray his trust, deceive the Board of Control, induce by fraud the payment by the State, the usage of the civilized word would warrant Michigan in punishing him, *although he never had set foot in the State until after the fraud was complete*. Acts done outside of jurisdiction but intended to produce and producing detrimental effects within it, justify a State in punishing the *cause* of the harm as if he had been present at the *effect*, if the State should succeed in getting him within its power. *Commonwealth v. Smith*, 11 Allen 243, 256, 259; *Simpson v. State*, 92 Ga., 41; 17 S. E. 984; *American Banana Co., v. United Fruit Co.*, 213 U. S. 347, 356; 53 L. Ed. 826, 832; 29 Sup. Ct. Rep. 511; *Commonwealth v. Macloon*, 101 Mass., 1, 6, 18; 100 Am. Dec. 89. *We may assume, therefore, that Daily is a criminal under the laws of Michigan.*"

In the case of *Ford v. United States*, 273 U. S. 593, this Court held that one may be guilty as a party to a conspiracy to import liquors into the United States in violation of the national prohibition law where there are overt acts committed in the United States pursuant to said conspiracy although the person was at the time of

the conspiracy *outside of the territorial jurisdiction of the United States.*

Affirming the judgment of conviction in the court below, the Court said (p. 619):

"The next objection of the defendants taken from the Quadra is that on all the evidence they were entitled to a directed verdict of not guilty. They argue that they are charged with a conspiracy illegally to import or to attempt to import liquor into the United States *when they were corporeally at all times during the alleged conspiracy out of the jurisdiction of the United States, and so could commit no offense against it* * * * The conspiracy was continuously in operation between the defendants in the United States and those on the high seas adjacent thereto, and of the four overt acts committed in pursuance thereof, three were completed and took effect within the United States and the fourth failed of its effect only by reason of the intervention of the Federal officers * * * In such a case all are guilty of the offense of conspiracy to violate the United States laws *whether they are in or out of the country.*"

In the Ford case the Court also quoted with approval an opinion rendered by John Basset Moore (later Judge of the permanent Court of International Justice), while he was Assistant Secretary of State, which opinion is found in *Moore's International Law Digest*, Vol. 2, p. 244:

"The principle that a man who, outside of a country wilfully puts in motion a force to take

effect in it is answerable at the place where the evil is done, is recognized in the criminal jurisprudence of all countries. And the methods which modern invention has furnished for the performance of criminal acts in that manner has made this principle one of constantly growing importance and of increasing frequency of application."

In *Latham v. United States*, (CCA 4; 1924), 2 F. (2d) 208, the evidence showed the defendants had been sailing a vessel laden with whiskey about fourteen miles off the coast of the United States with the intention of landing the unlawful cargo, and part of it had been landed, and they were arrested when they inadvertently came within two miles of shore.

The Court said in its opinion upholding the conviction (p. 210):

"It is argued on behalf of the defendants, however, that they should escape because the aiding and abetting in the crime of those who sold in the United States whiskey purchased from the ship was (done) on the high seas *outside* the territorial waters of the United States. The facts do not bring the case within the general rule that the character of the act as lawful or unlawful must be determined solely by the law of the country or place where the act is done. The defense, therefore, *that the defendants sold the whiskey on the high seas where it was lawful to sell it is not available*. The defendants being under arrest in the United States it *makes no difference that they were outside the juris-*

diction when by aiding and abetting they become principals in crime committed in the United States. They could not have been extradited as fugitives from justice because they had not fled the United States. By being under arrest in the jurisdiction they could be tried and convicted as participants in the crime."

In *United States v. Bowman*, 260 U. S. 94, the Court held that the defendant was properly convicted under a Federal statute prohibiting a conspiracy to defraud the United States Government by presenting false claims for payment even though the defendant was *without the jurisdiction* of the United States or any state thereof.

The Court distinguished between those types of crimes where the actor must be within the jurisdiction of the government to be punished, and those types of crimes where the actor need not be within the jurisdiction of the government in order to be punished, saying (p. 98):

"Crimes against private individuals of their property, like assault, murder, burglary, larceny, robbery, arson, embezzlement, and frauds of all kinds which affect that peace and good order of the community must, of course, be committed within the territorial jurisdiction of the government where it may properly exercise it. If the punishment of them is to be extended to include those committed outside of the strict territorial jurisdiction it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard." * * *

"But the same rule of interpretation should not be applied to criminal statutes which are,

as a class, not logically dependent on their locality for the government's jurisdiction, but are enacted because of the right of the government to defend itself against obstruction or fraud *wherever perpetrated*, especially if committed by its own citizens, officers, or agents. Some such offenses can only be committed within the territorial jurisdiction of the government because of the local acts required to constitute them. Others are such that to limit their locus to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute, and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home."

Under the decisions discussed above, the Florida statute is not subject to attack in this suit on the ground that it aims to punish parties, if they be found in the jurisdiction of the State, for acts done without the jurisdiction of the State of Florida with the intent to produce and producing results in the State of Florida which the Legislature has declared to be unlawful.

A fortiori section 8 of this statute which punishes only the *acts done in Florida* in pursuance of contracts made elsewhere, is valid.

(3) Section 1 and its dependent sections do not deny to the owners of copyrighted music the equal protection of the laws by subjecting them to regulations not imposed upon the owners of other copyrights or the owners of uncopyrighted literary property.

Plaintiffs' attach upon the statute in the court below rested upon *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, which held invalid the Illinois Anti-trust Act of 1893 because it specifically exempted from the entire operation of the statute all agricultural products and live stock while in the hands of the producer or raiser.

Appellants have no fear of the Connolly case if the Florida statute be judged by the *reasoning* of that case rather than merely by the *results* reached. For after saying (p. 558) that, "no rule can be formulated which will cover every case", the court pointed out specifically the defect in the Illinois statute, (p. 564):

"Two or more engaged in selling dry goods, or groceries, or meats, or fuel, or clothing, or medicines, are, under the statutes, criminals, and subject to a fine, if they combine their capital, skill or acts for the purpose of establishing, controlling, increasing, or reducing prices, or of preventing free and unrestrained competition amongst themselves or others in the sale of their good or merchandise; but their neighbors, who happen to be agriculturalists and live-stock raisers, may make combinations of that character in reference to their grain or live stock without incurring the prescribed penalty. Under what rule of permissible classification can such legislation be sustained as consistent with the equal protection of the laws? It cannot be said that the exemption made by the 9th section of the statute was of slight consequence, as affecting the general public interested in domestic trade and entitled to be protected against combinations formed to control prices for their own

benefit; for it cannot be disputed that agricultural products and live-stock in Illinois constitute a very large part of the wealth and property of that state."

If, therefore, there is a reasonable basis for the classification of holders of performance rights in copyrighted music which does not exist as to performance rights in other copyrighted material, or in uncopyrighted literary property, the Connolly case does not apply. The reason for the classification made in the Florida statute is plain.

Before drawing the comparison let it be borne in mind that this discussion excludes entirely the requirements of secs. 2-A, 2-B and 6 of the statute, shown above to have no relevance to the instant case.

First, as to owners of other copyrights: What likelihood is there that the owners of copyrights of a substantial portion of all of the books and plays in existence would or could combine to fix prices on public performance rights for their works? Has anyone ever heard of such a combination? What books or plays are broadcasted by radio to such extent as to make a matter of public concern the charges that are or might be required for such broadcasting? In this case plaintiffs allege (bill, par. 28, R. 27) that there are daily broadcasted in Florida "in excess of 100 copyrighted works of the complainants and other members of the Society and of its affiliated societies."

The quoted excerpt from the decision in the Connolly case shows that the exemption of agricultural products in Illinois was not "of slight consequence" because agricultural products and live stock comprise a large part

of the wealth of that state. Public performance rights in copyrighted works other than music would be "of slight consequence."

And now, turning to owners of uncopyrighted literary property: How could the owners of such property even discover one another so as to form such a combination? And of what value or consequence would performance rights in such uncopyrighted properties be, if combined?

In fact, to say that copyrighted music is on a parity with these other two classes as to performance rights is to ignore completely facts of which everyone is aware. It would be as logical to say that a law requiring banks to incorporate denied equal protection in not extending the regulation to everyone who might casually act as custodian of his friend's money, or make a personal loan to a friend.

In *Carroll v. Greenwich Ins. Co.*, 199 U. S. 401, the Insurance Company sued to enjoin the Auditor of Iowa from enforcing a statute of that state which forbade fire insurance companies or their agents to combine for the purpose of fixing rates. Upholding the statute against the attack that the equal protection of the laws was denied, this Court said (p. 410):

"It was pressed that there is no justification for the particular selection of fire insurance companies for the prohibitions discussed. With regard to this it should be observed, as is noticed by the appellees, that a general statute of Iowa prohibits all contracts or combinations to fix the price of any article of merchandise or commodity, or to limit the quantity of the same pro-

duced or sold in the State, Code of 1897, § 5060, and that this section covers fire insurance. *Beechley v. Mulville*, 102 Iowa 602. Therefore the act in question does little if anything more than apply and work out the policy of the general law in a particular case."

Similarly, in Florida there is a general statutory prohibition against trusts involving price-fixing activities (Laws of Florida 1915, Vol. I, p. 281 amended by Laws of Florida 1925, Vol. I, p. 517), which completes the analogy between the Carroll case and the case at bar.

In the Carroll case, the Court further said (p. 411):

"If the legislature of the State of Iowa deems it desirable artificially to prevent, so far as it can, the substitution of combination for competition, this court cannot say that fire insurance may not present so conspicuous an example of what that legislature thinks an evil as to justify special treatment. The imposition of a more specific liability upon life and health insurance companies was held valid in *Fidelity Mutual Life Insurance Co., v. Mettler*, 185 U. S. 308. See also *Missouri Pacific Ry. Co., v. Mackey*, 127 U. S. 205; *Orient Insurance Co., v. Daggs*, 172 U. S. 557; *Otis v. Parker*, 187 U. S. 606; *Home Life Insurance Co., v. Fisher*, 188 U. S. 726, 727."

The Carroll case has been cited and its reasoning applied in numerous later decisions of this Court.

In *International Harvester Co., v. Missouri*, 234 U. S. 199, the Missouri Anti-Trust Acts were upheld against

the contention that they denied equal protection in not extending the prohibitions of the statute to buyers as well as sellers. After analyzing and approving the Carroll decision, *supra*, the Court reviewed a number of its own decisions upholding state statutes which were charged with improper classification (pp. 211-214 incl.), among them the following:

Ozan Lumber Co., v. Union County Bank, *supra*—an Arkansas statute requiring notes given in consideration of patented articles to be on a printed form so stating, the statute *exempting* from its operation *merchants and dealers who sell patented things in the usual course of business*.

German Alliance Ins. Co., v. Kansas, 233 U. S. 389, 418—a statute which exempted *farmers mutual insurance companies* from certain regulations imposed upon *other fire insurance companies*.

Provident Savings Institution v. Malone, 221 U. S. 660—a Massachusetts statute providing for the taking into custody by state officers of *savings bank* deposits unclaimed for thirty years, not applying to *commercial bank deposits*.

See also *Radice v. New York*, 264 U. S. 292, in which a statute limiting hours of employment for women employees was held good despite the fact that it applied only to employees in cities of the first and second class, and exempted certain classes of restaurant employees even in the cities where it did apply. At pages 296 and 297 the Court cites a number of its other decisions in which similar differentiations in state statutes were held valid, saying (p. 296):

"The inequality produced, in order to encounter the challenge of the Constitution, must be '*actually and palpably unreasonable and arbitrary*'. *Arkansas Natural Gas Co., v. Railroad Commission*, 261 U. S. 379, 384, 67 L. Ed. 705, 710, 43 Sup. Ct. Rep. 387, and cases cited."

In the case at bar, it cannot be said that the inequality as between the owners of public performance rights in copyrighted music and owners of other copyright property or unpublished writings is "actually and palpably unreasonable and arbitrary", for the power of the two classes last mentioned to combine adversely to the public interest is at most a remote and speculative possibility.

In the light of these authorities it is readily seen that the Florida statute is not to be measured by the decision in *Connolly v. Union Sewer Pipe Co.*, supra, where the *exempted* classes (farmers and stock raisers) had the power and opportunity, by combining to fix prices, to affect the public interest no less injuriously than the classes *included* in the statute.

(4) The term "unlawful combination" as used in section 1 is sufficiently defined.

The bill (par. 7, R. 5) attacks section 1 as denying due process of law and violating the State Constitution, because it fails to inform the defendant of the nature of the accusation against him. The particular respect in which it so offends, they charged in their brief below, is the phrase making the combination unlawful "when the members therein constitute a substantial number of the firms, persons, or corporations within the United

States who own or control copyrighted * * * musical compositions". The statute, they say, gives no clue to what is meant by "a substantial number".

The barest examination of the remaining clauses in section 1 demonstrates this attack to be wholly unfounded. The clause next immediately following in section 1 shows that the *combination* does not become unlawful unless "one of its objects is the determination and fixation of license fees or other exactions." Later clauses declare "*any such combination*" to be an unlawful *monopoly*, and the fixing of prices to be illegal and "*in restraint of trade*."

When these clauses are considered as forming integral parts of one picture, viz, the type of combination declared unlawful, it is seen that the statute measures fully up to the standard of definiteness met by the Sherman Anti-trust Act (U. S. C., Tit. 15, Sec. 1). Section 1 of the Sherman Act denounces as illegal,

"Every contract, combination in the form of trust or otherwise, or conspiracy, *in restraint of trade* or commerce among the several States, or with foreign nations * * *";

While section 2 declares guilty of misdemeanor,

"*Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations * * **"

This Court has refused to declare the Sherman Act invalid as an unconstitutional delegation of power, to the Court because of the generality of the first two sections.

Standard Oil Co., v. U. S., 221 U. S. 1.

In *Sugar Institute v. United States*, 297 U. S. 553, 600, the Court said:

"We have said that the Sherman Act, as a charter of freedom, has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions."

The Florida monopoly statute, *supra*, in defining the word "trusts" and "combinations" uses language that is certainly no less "indefinite" than the statute here assailed.

And indeed it must be so. Can it be doubted that, with the power and wealth of the combinations of capital which have grown up in this country in the last 50 years, they would be able to employ legal and business talent sufficiently capable to circumvent any *exact* definition of these terms Congress or the state legislature might use?

The cases cited in support of this point in plaintiffs' brief below dealt with problems such as rates of wages (*Connolly v. General Const. Co.*, 269 U. S. 385) and prices of necessities (*U. S. v. Cohen Grocery Co.*, 255 U. S. 81). The difference between such situations and that dealt with in this Florida statute is obvious. How was a grocer to know whether he was charging a just or an unreasonable price when he sold his customer a pound of sugar or flour? He might violate the law without the slightest intention of doing so. However, under the Florida statute now before the Court, no one could become a member of a combination declared unlawful in section 1 without knowing that it was directly intended

as a means of price fixing and that it was sufficiently powerful to enforce at least partially its strangle hold on the entertainment industries.

D. Section 3, in declaring void all existing contracts for public performance in Florida made with an unlawful combination as defined in section 1, does not offend against constitutional guaranties.

The attack of the bill of complaint against this section (pars. 7 and 36; R. 6 and 33) is that it impairs the obligations of contracts heretofore made by the plaintiffs, and that it is an *ex post facto* law.

In considering this section it should be borne in mind that there is a difference between interference by legislative enactment with a contract whose subject matter was *per se* harmless and in accordance with the public policy of the State, and interference with one which inherently belongs in the field of police power.

In *Worthen v. Kavanaugh*, 295 U. S. 56, this Court said:

“ ‘It is settled that neither the contract clause nor the due process clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise.’ Atlantic

Coast Line R. Co., v. Goldsboro, 232 U. S. 548 * * *

To like effect see:

Manigault v. Springs, 199 U. S. 473;

New Orleans Gas Co., v. Louisiana etc., Co.,
115 U. S. 650;

New Orleans Water Works Co., v. Rivers, 115
U. S. 674;

*Union Dry Goods Co., v. Georgia Public Ser-
vice Corp.*, 248 U. S. 372;

Stephenson v. Binford, 287 U. S. 251, 276.

In *Home Building & Loan Association v. Blaisdell*,
290 U. S. 398, 434-5, the Court said:

"* * * the state also continues to possess au-
thority to safeguard the vital interests of its
people. It does not matter that legislation ap-
propriate to that end 'has the result of modify-
ing' or abrogating contracts already in effect'.
Stephenson v. Binford, 287 U. S. 251, 276."

And so it is in the field of monopoly, which has always
been regarded as inimical to the public welfare and
against public policy. *Standard Oil Co., v. United States*,
221 U. S. 1.

Section 3 does not attempt to invalidate any existing
contracts or licenses except those made with an unlaw-
ful combination as defined in the act; nor does it in any
wise interfere with the full enjoyment of all rights of
the copyright owner, including the right of collection of
license fees, unless he has subjected himself to the State's
police power by affiliating with the unlawful combination.

Appellees' contention that the statute in this regard is an *ex post facto* law is not maintainable, for this Court has repeatedly decided that the term "*ex post facto*" as used in the Federal Constitution relates to criminal laws only.

Carpenter v. Pennsylvania, 17 How. 456,
citing;

Colder v. Bull, 3 Dall. 386;

Fletcher v. Peck, 6 Cranch 87.

There can be no question of the creation of a retrospective crime here. *It is not the past act of making the contract that becomes an offense under section 3, but the future act of attempting to enforce such a contract.*

And finally, even if section 3 were held to impair the obligation of contracts within the meaning of the Constitution, the section is clearly severable from the remainder of the act, for it cannot be said, particularly in the face of section 12, that the Legislature would not have adopted the statute minus section 3. Clearly the major purposes of the statute could be accomplished without section 3.)

The situation is entirely different from the Illinois Anti-trust Act held void in *Connolly v. Union Sewer Pipe Co.*, supra. There the offending section created an excepted class who, though performing the actions denounced by the statute, yet by express language fell without its penalties. Consequently the court was obliged to hold that the Legislature would not have enacted the statute had it realized that farmers creating monopolies must be punished as well as merchants.

E. The Penalties Imposed by Section 8 for Violations of the Statute are not so Severe as to Prevent Plaintiffs from Testing its Validity Aliunde a Court of Equity.

In paragraph 35 of the bill (R. 30) it is charged that the penalties attached to the violation of the statute are so great that

"* * * neither complainants nor others similarly situated may continue to grant licenses to users of music within the State of Florida or even to users of music without the State of Florida if the public performance for profit of such music may be reproduced or performed within the State of Florida."

The penalty section of the statute, Section 8, provides

"* * * a fine of not less than \$50.00 or more than \$5,000 and by imprisonment in the penitentiary not less than *one* or more than ten years, or by *either* such fine or imprisonment."

The impressive thing about this feature of the statute is its flexibility. It must be obvious—to all but those who refuse to see—that the Legislature realized that violations of this Act would differ very widely in reprehensibility. For that reason it left to the court a wide margin of discretion; for offenses of minor character or those entered into without willful intent, the total punishment might amount to no more than a \$50 fine with no imprisonment. Thus, in the usual course of judicial discretion, the severer penalties would be reserved for those whose wrongful acts were aggravated.

by intentional disregard of the statute, or by repeated offenses.

In the supporting affidavit of the plaintiff Gene Buck (R. 104) he states that in 1936 the Society received \$3,200,000 from its contracts with broadcasters alone. In paragraph 36 of the bill (R. 32, 33) the allegation is made that each of the three publisher plaintiffs received during the year 1936 as net compensation from public performance rights in excess of \$50,000; and that each of the individual plaintiffs during that year received in excess of \$5,000. Realizing that there are 123 publisher members of the Society, and 1000 author and composer members, it is easy to see that the financial resources of the Society would not be materially threatened by such penalties as might be suffered under the Florida statute during the testing out of its constitutionality.

The cases relied on by the plaintiffs in the lower court do not bear out their contention as to the excessive character of the penalties of the Florida statute.

Pierce v. Society of Sisters, 268 U. S. 510 involved an Oregon statute providing compulsory attendance of children at the public schools in the district in which they resided. It provided penalties against non-complying parents and guardians, a fine of not less than \$5 nor more than \$100, imprisonment in the county jail not less than 2 nor more than 30 days, or both fine and imprisonment. The effect of the statute would have been undoubtedly to destroy the profitable business of the private schools in that state. The decision of this Court was specifically rested on that ground (pp. 534, 536), and not at all upon the size of the penalty. The penalty was applicable, not to the plaintiff schools, but to parents

who did not send their children to the public school. Obviously there is no analogy between this case and the case at bar.

Ex Parte Young, 209 U. S. 123, was a Minnesota statute fixing maximum freight and passenger rates which could be charged for intra-state traffic. The penalties were as follows: exceeding maximum freight rates, first offense, not less than \$2,500 nor more than \$5,000, and for second and subsequent offenses, not less than \$5,000 and not more than \$10,000; exceeding maximum passenger rates was made a felony punishable by a fine not exceeding \$5,000 or imprisonment not exceeding 5 years or both. Each shipment of freight and each carriage of a passenger at greater than the prescribed rate would constitute a separate offense and, when one considers the enormous volume of traffic carried by railroads, it is easy to see that a solvent carrier might be rendered bankrupt by the result of a few days operation in Minnesota.

Smyth v. Ames, 169 U. S. 466, even more strikingly illustrates plaintiffs' inability to make an accurate comparison where their own interests are involved. That also was a statute fixing maximum railroad rates for intra-state commerce (Nebraska). It provided penalties as follows:

First offense—not less than \$1,000 nor more than \$5,000

Second offense—not less than \$5,000 nor more than \$10,000

Third offense—not less than \$10,000 nor more than \$20,000

Each subsequent offense—a fixed fine of \$25,000.

In addition each individual shipper was given an action for damages, including attorney's fees.

F. In Passing Upon this Statute the Court will not Consider the Attempts of the Appellees to Impugn the Motives of the Florida Legislature in Enacting It.

In paragraph 32 of the bill (R. 29) it is charged that the statute is not a reasonable exercise of the police power but a pretext under which the State is attempting to usurp the powers of Congress with respect to copyrights,

“ . . . and said State Statute interferes with the copyrights of the complainants and others similarly situated under the guise of an exercise of the police power of said State; the said State Statute, in truth and in fact, was enacted, not in the public interest, but rather for the private benefit and gain of a group of users of music in an organized effort to enable such users to have free access to the copyrighted works of complainants and others similarly situated, without paying compensation therefor, and without danger of being compelled to pay damages for infringement as provided for in the Copyright Act.”

A large part of the lengthy supporting affidavit of plaintiff Gene Buck is taken up with similar attempts

to impugn the motives of the Legislature in enacting the statute. See especially the following (R. 125, 126):

"The State Statute was introduced in the Senate by Hon. John R. Beecham, State Senator, who is also the chief executive of radio broadcasting station WJNO, at West Palm Beach, Florida.

"The Statute was introduced for the private benefit of the Florida radio broadcasters and hotel owners, who have powerful local trade associations. Senator Beecham is one of the members of the executive committee of the Association."

The Buck affidavit is also replete with similar attempts to smear legislation of like character adopted in Montana and Nebraska. Doubtless the brief which appellees will file in this Court will contain similar matter.

We are confident that this Court will not be interested in weighing or considering charges of this character. As was said in *Southwestern Oil Co., v. Texas*, 217 U. S. 114, 126:

"But we will not speculate as to the motives of the state, and will assume—the statute, either upon its face or by its necessary operation, not suggesting a contrary assumption—that the state has in good faith sought, by its legislation, to protect or promote the interests of its people."

G. Section 12 is an Effective Provision to Save the Remainder of the Statute in Case any Particular Provision Should be Held Void.

Section 12 is a clause frequently used in legislative enactments providing that the unconstitutionality of any part of the Act shall not affect the remaining portion.

Appellants believe it has been demonstrated in this brief that Section 1 and its dependent sections are all valid enactments and that the remaining sections through Section 11-B are withdrawn from the consideration of the Court in this case, because dissociated from the duties laid upon the state prosecuting officers or because involving merely procedural questions which may never arise. We urge, however, that if, contrary to our contention, some portion of the statute other than Section 1 should be held unconstitutional, Section 12 will be fully operative to rescue the remainder.

This Court has several times been called upon to determine the effect of such a saving clause. In *Williams v. Standard Oil Co.*, 278 U. S. 235, the Court passed upon the validity of a Tennessee statute which contained a saving clause similar to Section 12 of the Florida statute. The rule there laid down may be briefly summarized as follows:

(a) In the absence of such a legislative declaration the presumption is that the Legislature intends the act to be effective as an entirety (p. 241).

(b) If there be such a declaration, its effect is (p. 242):

“ * * * to create in the place of the presumption just stated the opposite one of separability.

That is to say, we begin in the light of the declaration, with the presumption that the legislature intended the act to be divisible; and this presumption must be overcome by considerations which make evident the inseparability of its provisions or the clear probability that the invalid part being eliminated the legislature would not have been satisfied with what remains."

(c) In either event the presumption is a rebuttable one. This principle was applied in *Highland Farms Dairy v. Agnew*, 300 U. S. 608, with regard to a Virginia statute containing a clause similar to the one at bar.

Applying the principle to the Florida statute, it is readily seen that the dominant motive of the Legislature was to prevent price-fixing combinations with respect to public performance rights in copyrighted music performed in Florida (Section 1), and that the other sections which refer to Section 1 are merely tools designed to effectuate that purpose. Section 1 being a valid exercise of the State's police power, in this case it will be impossible for the appellees to meet the burden of overthrowing the presumption of separability which attaches to all of the sections which refer to Section 1, viz., Sections, 3, 4-A, 4-B, 5-A, 5-B, 7-A, 7-B, 8 and 9, or the like presumption which attaches to Sections 10-A, 10-B, 11-A and 11-B, which, while not expressly conditioned upon Section 1, are obviously dependent upon it.

A fortiori the presumption attaches to Sections 2-A, 2-B and 6 which relate to subjects totally dissociated from the main purpose of the Act.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION IN GRANTING THE INTERLOCUTORY INJUNCTION. (Assignment of Errors 7-9 incl.)

Conceding, *arguendo* merely, that the District Court had jurisdiction as a Federal Court to take the case; that equitable aid could properly be granted to such a combination as effected by the plaintiffs in this case; and that there is doubt as to the constitutionality of the Florida statute—appellants still urge that the District Court abused its discretion in granting the temporary injunction for the following reasons:

A. There is no Reasonably Grounded Apprehension of Irreparable Injury Such as Would Justify the Granting of a Temporary Injunction.

The bill alleges (par. 34, R. 29, 30) that the defendants and each of them have threatened to, and will, enforce the State statute against the members of the Society in the event that they "refuse to accept or submit to a system of compulsory licensing"; and that the defendants have threatened to enforce the penal and confiscatory provisions of the statute against the plaintiffs and their associates performing any of the acts denounced by the statute.

These allegations are not supported by any statement as to how, when, where or to whom such threats were made, and doubtless this detail was omitted for the best of reason.

At the time of granting the injunction the District Court had before it the affidavit of Cary D. Landis, then Attorney General of Florida, the state officer whose direction and approval must be obtained before any of the other defendants might bring an action under this statute, either civil or criminal (Aff. Landis, R. 211; Statute, Sec. 9). In this affidavit the Attorney General alleges unqualifiedly that no violations of this statute have been called to his attention, and, upon information and belief, that there have been no such violations; positively that he has not, nor has he authorized anyone on his behalf, to threaten anyone with prosecution under this statute.*

In the light of these statements by the chief law enforcement officers of the State of Florida, it is impossible to lend any credence to the statement made in the bill to the effect that the Attorney General and each of the fifteen State's Attorneys of Florida have threatened to bring such action.

Other facts also before the District Court indicated strongly the absence of any ground of apprehension of immediate and irreparable injury to plaintiffs:

1. The statute became effective June 9, 1937, nearly eight months prior to the institution of this suit (February 7, 1938) and it is inconceivable that had this apprehension of serious injury been actually entertained,

*This affidavit has since been supplemented by the affidavit to like effect, made by Judge Landis' successor in office, George Couper Gibbs (see "Motion of Appellant State's Attorneys to Vacate Decree and Direct Dismissal of Bill of Complaint", pp. 12, 13).

plaintiffs would have waited eight months before bringing this suit.

2. Affidavits of broadcasters tendered in connection with defendants' motion to deny the hearing show that the general course of action on the part of the broadcasters since the enactment of the statute had been to forward to the Society regular remittances under their license agreements, or to offer to do so, but the Society has declined to accept all such remittances.

B. The District Court granted the Interlocutory Injunction When it did not Persuasively Appear from any Finding of Fact and Conclusions of Law that the Unconstitutionality of the Statute is Reasonably Free from Doubt.

The District Court's order granting the temporary injunction was entered April 4, 1938 (R. 270). With it there were filed no findings of fact and conclusions of law, as required by Equity Rule 70½ as amended November 25, 1935, but merely a "Memorandum Opinion" (R. 268). This memorandum opinion after an extremely brief analysis of the statute concluded with the following paragraphs (R. 269):

"The bill alleges that the enforcement of this Act will violate rights granted to them by the copyright Act of Congress; that it is in violation of the Federal Constitution and impairs the terms of certain existing contract held by these plaintiffs.

"The cause is before this Court upon application for interlocutory injunction; upon the bill

of complaint, affidavits filed therewith and upon motion to dismiss the bill of complaint.

"It is alleged that the defendants have threatened to and will enforce the provisions of this Act to the irreparable injury of plaintiffs unless such injunction order is issued.

"It appearing to the Court that plaintiffs have shown that great damage will be inflicted upon them if preliminary injunction is not granted, and that there is grave doubt of the constitutionality of the Act;

"It is considered by the Court that an order be entered granting such interlocutory injunction and that the motion to dismiss the bill be denied."

The order allowing appeal was entered by the Court April 25, 1938 (R. 274). Defendants' jurisdictional statement was filed April 25, 1938 (R. see "Statement as to Jurisdiction"), including the "Memorandum Opinion" above mentioned. In the jurisdictional statement (pp. 6, 7) specific reference was made to the failure of the District Court to enter findings of fact and conclusions of law as directed by the Equity Rule.

It was not until May 17, 1938, that the District Court entered the "Findings of Fact and Conclusions of Law", which now appear in the Record at page 276. These facts are recited not merely because of a technical infraction of the Equity Rule, but because, taken as a whole, they indicate to us that at the time of the granting of the injunction, the specially constituted three-judge District Court had not bestowed upon the question of the con-

stitutionality of the Florida statute the deliberation which this Court by the amendment of November 25, 1935, to Equity Rule 70½ intended should be bestowed.

In *Railroad Commission of Wisconsin v. Maxcy*, 281 U. S. 82, the three-judge District Court had enjoined an order of the Wisconsin Railroad Commission fixing rates without rendering an opinion. On appeal this Court set the decree aside and remanded the cause to the District Court with direction to state its findings of fact and conclusions of law. In its opinion (p. 83) the Court said:

“In *Lawrence v. St. Louis-San Francisco R. Co.*, 274 U. S. 588, 596, 71 L. ed. 1219, 1224, 47 Sup. Ct. Rep. 720, the court said: ‘The importance of an opinion to litigants and to this court in cases of this character was pointed out in *Virginian R. Co. v. United States*, 272 U. S. 658, 675, 71 L. ed. 463, 472, 47 Sup. Ct. Rep. 222. The importance is even greater where the decree enjoins the enforcement of a state law or the action of state officials thereunder. For then the respect due to the state demands that the need for nullifying the action of its legislature or of its executive officials be persuasively shown.’ ”

The *Maxcy* case was dealing with a final decree, but later a similar question arose with reference to an interlocutory injunction such as was issued in the case at bar.

In *Public Service Commission of Wisconsin v. Wisconsin Telephone Co.*, 289 U. S. 67, appeal was taken from an interlocutory injunction against a rate order

of the state Public Service Commission. No opinion was rendered by the District Court, but there was a statement in the decree for injunction to the effect that the rates "would result in the confiscation of the property" of the complainants, and would deprive it of its property "without compensation and without due process of law". That finding appears to be a considerably stronger statement than the statement in the Memorandum Opinion in the case at bar (R.), "that there is grave doubt of the constitutionality of the Act."

This Court, in its opinion, cited various prior decisions requiring the findings of law and fact in such cases, including the Maxcy case, *supra*, then added (p. 70):

"These reasons exist, and are not the less imperative, when the injunction is interlocutory. *Lawrence v. St. Louis-San Francisco R. Co.* 274 U. S. 588, 71 L. ed. 1219, 47 S. Ct. 720, *supra*. It was to insure careful and deliberate action upon such interlocutory applications that the Congress has required that they should be heard before three judges. That requirement applies only when an interlocutory injunction is sought."

It was following the Wisconsin Telephone case, *supra*, that this Court in 1935 amended Equity Rule 70½ so as to include specifically the requirement for findings of fact and conclusions of law in interlocutory injunctions.

In no sense of the word does the Memorandum Opinion of April 4, 1938, conform to the requirements of the rule. The opinion does not even find it to be true that the defendants have threatened to enforce the Act. It merely states "it is alleged that the defendants have

threatened, etc." While stating that there is grave doubt of the constitutionality of the Act, it fails to point out a single particular which might give rise to such a doubt. The Findings of Fact and Conclusions of Law filed May 17, 1938, may assist this Court in the performance of its appellate duties—that is not for us to say.

Even a cursory examination of the document shows it to be merely a condensation of the bill of complaint. The findings of fact are only conclusions, for the most part erroneous and insufficient to cover the issues before the Court. To a considerable extent they deal with Sections 2-A, 2-B and 6 of the Act, which we have already demonstrated are not properly under consideration in this action. As illustrative of the incompleteness and the incorrectness of these findings, we cite the following:

Finding of Fact No. 2. Here the Court found that the complainant Society constituted a substantial number of persons who own or control copyrighted musical compositions, but it failed to make any reference in its findings as to the monopolistic activities of the Society which plainly appeared in the record.

The findings do not refer to the fact that the Society refuses to grant a license for less than its entire portfolio of music; or the fact that it requires as a prerequisite of membership an assignment of public performance rights in all copyrighted music owned or controlled by the members for the life of the contract; or the fact that in fixing royalties for radio stations it discriminates most oppressively against stations which are not controlled by a newspaper. Had the Court considered these uncontroverted facts,—all shown to be such in Part II

of this brief—we doubt that it would have granted the Society injunctive relief.

Finding of Fact No. 4. Here the Court says that the action is one in equity arising out of the Constitution of laws of the United States and the matter in controversy exceeds \$3,000 exclusive of interest and cost, yet nowhere in the remainder of the findings of fact or conclusions of law is shown the value of complainants' business, the amount of business transacted within the State, the amount it cost the complainants to operate within the State, or the difference between operating under the statute and operating free of its restrictions.

Findings of Fact Nos. 5 and 6. These findings illustrate the failure of the Court to correctly determine the scope of the statute and the duties of the State enforcement officers thereunder. These findings are based exclusively on the theory that the defendants are charged under the statute with enforcing the provisions of Sections 2-A and 2-B—a totally unwarranted construction of the law, as demonstrated in Part III of this brief.

Finding of Fact No. 7 is clearly erroneous, because the thing penalized under the statute (Sec. 8) is not the making of the contract outside of the State of Florida, but the performance of the contract and the collection of moneys thereunder in the State of Florida.

Finding of Fact No. 8 is also erroneous, because classification in itself is not unlawful. The Court here overlooked entirely the factual differences in the situation of public performance rights with respect to copyrighted matter and common law ownership of unpublished works—differences so striking as plainly to mark the

copyrighted music performance rights alone as a proper subject for legislative action (supra, Part III).

Finding of Fact No. 9. This finding is so confusedly worded as to be practically unintelligible.

Finding of Fact No. 10 fails completely to take into consideration the elasticity of the penalties provided by Section 8 of the statute.

We respectfully submit that although the findings are called findings of fact and conclusions of law, they are in reality but a brief summary of the bill of complaint. The mere fact that the document filed is called "findings of fact and conclusions of law" does not make it that. The contents of this paper are only conclusions, and do not in any manner conform to Equity Rule 70 $\frac{1}{2}$, as interpreted by this Court in *Interstate Circuit, Inc., v. United States*, supra.

With the permission of the District Court, appellants were enabled to amend their statement as to jurisdiction by a footnote which took cognizance of the findings of May 17, 1938, but certainly what was intended by the Equity Rule, as well as the decisions noted above, was also to give to the State affected by the injunction the benefit of that deliberative consideration which only the preparation of findings *before* the granting of injunction would insure.

Perhaps the decision of the District Court would have been the same had it complied with the spirit of these decisions and the Rule. Be that as it may, appellants urge that in the light of the argument submitted above the need for nullifying the Act of the Florida Legislature has not been "persuasively shown" by the findings of May 17, 1938. *Railroad Commission v. Maxcy*, supra.

CONCLUSION

Appellants urge that under the facts and law of this case as set forth in the preceding pages of this brief, the order appealed from is clearly erroneous and should be reversed, with direction to dismiss the bill of complaint.

Respectfully submitted,

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APPENDIX I

CHAPTER 17807

SENATE BILL NO. 679

AN ACT Declaring to be an Unlawful Monopoly and Its Purposes to be in Restraining of Trade, any Combination of Persons, Firms or Corporations Which Determine the Amount of Money to be Paid to it or to Its Members for the Privilege of Rendering Privately or Publicly for Profit Copyrighted Vocal or Instrumental Musical Compositions, When Such Combination is Composed of a Substantial Number of All Musical Composers, Copyright Owners, or Their Heirs, Successors or Assigns; to Require Each Composer and Each Author of Vocal or Instrumental Copyrighted Musical Compositions to Act Independently of any Combination as Herein Declared Unlawful in Determining License Fees and Other Rights; to Require the Author, Composer and Publisher to Specify Upon the Musical Composition the Selling Price Thereof, Including Public Performance for Profit; to Declare That any Purchaser Thereof, Who Pays Such Price Therefor Shall Have the Right to Render Such Music Privately or Publicly for Profit; to Declare All Existing Agreements Requiring License Fees or Other Exactions for the Privilege of Rendering Copyrighted Musical Compositions Publicly for Profit, Made With any Combination, Firm or Corporation Herein Declared Unlawful, to be Void and Nonenforceable; to Permit the Present Owners, Possessors and Users of Such Copyrighted Music to Render the Same Privately or Publicly for Profit Without Interference by Such Unlawful Combination; to Provide for the Pro-

tection of Theatres, Moving Picture Houses, Hotels, Places for Education and Public Performance or Amusement, Radio Broadcasting and Radio Receiving and Radio Re-Broadcasting Station Affiliated with other Persons, Firms or Corporations Outside of the State of Florida, Against the Collection of License Fees or Other Exactions by such Out of the State Affiliates for or on Account of any Combination Herein Declared Unlawful; To Provide All Liability for any Infringement of Copyrighted Musical Compositions Conveyed by Radio Broadcasting, Air, Wire, Electrical Transcription, or Sound Producing Apparatus, or by Personal Performance Coming Outside of the State of Florida and Used Herein to Rest Exclusively on the Out of State Person, Firm or Corporation Originally Sending the Same Into This State for Use Herein; to Provide Penalties for the Violation Hereof; to Empower the State's Attorney, Under the Direction of the Attorney General, Upon the Complaint of any Party Aggrieved by any Violation Hereof to Proceed to Enforce the Members, Agents or Representatives; to Empower any Party Aggrieved by any Violation Hereof to Proceed in His Own Right Hereunder; to Define the Legal Procedure Required to Carry Out the Provisions Herein; to Provide for the Recovery of Costs, Expenses and Attorney's Fees; to Provide That the Terms of this Act Shall be Cumulative; to Provide that any Part of this Act Declared Illegal Shall not Affect the Validity of the Remaining Parts Hereof.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF FLORIDA:

Section 1. It shall be unlawful for authors, composers, publishers, owners, or their heirs, successors or assigns,

of copyrighted vocal or instrumental musical compositions to form any society, association, partnership, corporation or other group or entity, called herein a combination when the members therein constitute a substantial number of the persons, firms or corporations within the United States who own or control copyrighted vocal or instrumental musical compositions, and when one of the objects of such combination is the determination and fixation of license fees or other exactions required by such combination for itself or its members or other interested parties for any use or rendition of copyrighted vocal or instrumental musical compositions for private or public performance for profit; and the collection or attempted collection of such license fee or other exaction so fixed and determined by any member, agent, or representatives of such combination herein declared unlawful, from any person, firm or corporation within this State, including theatres, radio receiving, radio broadcasting and radio re-broadcasting stations, moving picture houses, hotels, restaurants, clubs, dance halls, recreation rooms, pavilions, colleges, universities, churches, or any one who uses music in the conduct of his business, or the officers, directors, proprietors, managers, owners or representatives thereof, who render or cause to be rendered or permit to be rendered such copyrighted vocal or instrumental musical compositions privately or publicly for profit through personal performance, or through radio or any instrumentality or sound producing apparatus, shall be and the same are hereby declared unlawful and illegal; and such license fees or other exactions by such combination or its agents, members, or interested parties, shall not be collected in any Court within the boundaries of this State; and such

collection or attempted collection of such license fee or other exaction by such combination or its agents, members or interested parties, shall be a separate offense hereunder; and any such combination of authors, composers or publishers, or their heirs, successors or assigns, as herein defined, is hereby declared to be an unlawful monopoly in this State; and the fixing of prices or exactions for use or rendition of copyrighted musical compositions and the collecting or attempting to collect such license fees or other exactions by it or for its members or other interested parties, is hereby declared illegal and in restraint of trade; and such collection or attempted collection is declared to be an intrastate transaction within this State, and shall be subject to the terms and penalties of this Act.

SECTION 2-A. All authors, composers or publishers, and their heirs, successors or assigns, shall specify or cause to be specified legibly upon the musical composition, in whatever form the same may be published, printed, manufactured or otherwise prepared for use or rendition, the selling price thereof so arrived at and determined for all uses and purposes; and when any purchaser or user acquires the same within this State and pays the selling price so specified thereon to the seller or publisher of such musical composition, then said purchaser or user may use or render, or cause or permit to be used or rendered, the said copyrighted musical composition by persons individually or with other performers, actors and singers, or by an individual instrument player, or by orchestras and bands, or over, through or by means of radio loud speakers, radio receiving, radio broadcasting and radio re-broadcasting stations, electrical transcriptions, musical rec-

ords, sound apparatus or otherwise, and the same may be so rendered either privately or publicly for profit without further license fees or other exactions; and such copyright owner or proprietor in such event shall be deemed to have received full compensation for the rendition and all uses of such musical compositions for private and public performance for profit.

SECTION 2-B. In the event any author, composer or publisher, or any of his heirs, successors or assigns, fails or refuses to affix on the musical composition the selling price, and collect the same, for private or public performances for profit, at the time and in the manner specified in this Act, then any person, firm, or corporation in this State who may have purchased and paid for such copyrighted musical composition, may use the same for private or public performance for profit without further license fee or other exaction; and such person, firm or corporation so using or rendering the same shall be free from any and all liability in any infringement or injunction suit, or in any action to collect damages instituted by such copyright proprietor or owner in any Court within this State.

SECTION 2-C. Nothing in this Section or this Act shall be construed to give to any purchaser of copyrighted musical compositions, as herein provided, the right to resell, copy, print, publish or vend the same; nor to prevent authors and composers from determining and fixing the price to be charged for the use or rendition of their copyrighted musical compositions, provided such authors and composers act independently of any such combination as in Section 1 hereof declared unlawful.

SECTION 3. All existing contracts, agreements or licenses now existing within this State, made by any person, firm or corporation with any combination declared unlawful under Section 1 hereof, are hereby declared void and non-enforceable in any Court within this State, and are hereby declared to have been entered into as intra-state transactions with such unlawful combinations and in restraint of trade. And all such contracts, agreements, licenses and the attempted enforcement thereof may be enjoined by any person, firm or corporation sought to be bound thereby; and any agent, member or representative of such unlawful combination enforcing or attempting to enforce the terms of such existing contract, agreement or license, shall be guilty of a violation of the terms of this Act: and for any collection or attempted collection of moneys set out in the illegal contract, agreement or license, shall be subject to the penalties of this Act.

SECTION 4-A. Any person, firm or corporation who owns, leases, operates or manages a radio broadcasting radio receiving or radio re-broadcasting station within this State, shall be and is hereby authorized to receive, broadcast and re-broadcast copyrighted vocal or instrumental musical compositions, the copyrights of which are owned or controlled by any such combination declared unlawful by Section 1 hereof, without the payment, to such combination or to its agents, representatives or assigns, of any license fee or other exaction declared illegal and non-collectible by the terms hereof.

SECTION 4-B. When such radio receiving, radio broadcasting or radio re-broadcasting station is affiliated with any other person, firm or corporation owning, leas-

ing or operating a radio broadcasting station outside this state from whence copyrighted vocal or instrumental musical compositions originate or emanate, and which are received, used, broadcast or re-broadcast within this State, in accordance with the terms of any affiliation agreement or other contract, then such person, firm or corporation owning, leasing, operating or managing a radio broadcasting station outside this State shall be and is hereby prohibited from in any manner charging or attempting to charge, or collecting or attempting to collect, from any person, firm or corporation who owns, leases, operates or manages a radio broadcasting, radio receiving or radio re-broadcasting station within this State, any herein declared non-collectible license fee or other exaction, for the purpose of paying or repaying the same outside this State to any combination, or its members, stockholders or other interested parties, declared unlawful by Section 1 hereof; and any such person, firm or corporation, collecting or attempting to collect such license fee or other exaction against such persons, firms or corporations within this State for the purpose of paying or reimbursing itself for having paid any such license fee or other exaction herein declared unlawful and non-collectible, shall be deemed guilty of a violation of the provisions of this Act; and such person, firm or corporation from without this State is hereby declared to be an agent and representative of such combination as declared illegal and unlawful by Section 1 hereof and shall be subject to all the penalties hereof.

SECTION 5-A. Any person, firm, or corporation, who owns, operates, or manages any theatre, or theatres, moving picture house or houses, or a similar place or places for amusement and public performance within

this State; shall be and is hereby authorized to receive, use and render, or cause to be received, used and rendered, by the personal performance of artists, singers, musicians, orchestras, bands, or actors, or by loud speakers, radio, sound production or re-production apparatus or instrumentalities, or electrical transcriptions, or by any other means of rendition whatsoever, copyrighted vocal or instrumental musical compositions, the copyrights of which are owned or controlled by any such combination declared unlawful by Section 1 hereof, without the payment to such combination, or to its agents, representatives or assigns, of any license fee or other exaction declared illegal and non-collectible by the terms of this Act.

SECTION 5-B. When such theatre or theatres, moving picture house or houses, or other places for amusement or performance is or are affiliated or under contract in any manner whatsoever with any other person, firm or corporation furnishing in any form or manner copyrighted musical compositions from outside this State, or supplying such persons, firms or corporations in this State with radio broadcasts or electrical transcriptions, sound production instrumentalities or apparatus, or artists, performers, musicians, singers, players, orchestras, bands or other artists or talent, wherein or whereby copyrighted vocal or instrumental musical compositions are privately or publicly rendered for profit, then such person, firm or corporation outside this State shall be and is hereby prohibited from in any manner charging or attempting to charge, or collecting or attempting to collect, from any such person, firm or corporation who owns, leases, operates or manages such theatre or theatres, moving picture house or houses, or

other places for amusement or public performance within this State, any license fee or other exaction for the purpose of paying or repaying the same to any such combination declared unlawful by Section 1 hereof for the use, rendition or performance of such copyrighted musical compositions; and any such person, firm, or corporation, collecting or attempting to collect, such license fee or other exaction from outside this State against such persons, firms or corporations within this State for the purpose of paying or reimbursing itself for having paid any such license fee or other exaction herein declared unlawful and non-collectible, shall be deemed guilty of a violation of the provisions of this Act; and such person, firm or corporation from without this State is hereby declared to be an agent and representative of such combination declared illegal and unlawful by Section 1 hereof and shall be subject to all the penalties hereof.

SECTION 6. Whenever any person, firm or corporation who owns, leases, operates or manages a radio receiving, radio broadcasting or radio re-broadcasting station or theatre or moving picture house or similar place for amusement and public performance or for the rendition in any manner of copyrighted vocal or instrumental musical compositions, and which radio stations and theatres, and other persons, firms or corporations aforementioned, are affiliated with persons, firms or corporations outside this State from whence said copyrighted vocal or instrumental musical compositions originally emanate either by radio, sound production instrumentalities or apparatus, or by furnishing a person or persons to play or sing such music within this State, then the responsibility and liability for the use of all copyrighted

Vocal or instrumental musical compositions, thus emanating from outside this State shall rest with and be upon such affiliated person, firm or corporation from outside this State who originates the broadcasting or the performance or the sound production instrumentality or apparatus, or sends the personal singers or performers into this State; and the owner or proprietor of the copyrighted vocal or instrumental musical compositions shall be and is hereby prohibited from suing for infringement, loss or damage within the boundaries of this State, for the use or rendition of such copyrighted vocal or instrumental musical compositions because such persons, firms or corporations used, rendered or performed the same within the State; and said copyright owner or proprietor shall make his collection therefor from the person, firm or corporation from outside this State from whence the use of said copyrighted vocal or instrumental musical compositions originally emanated; the use or rendition by radio broadcast, radio re-broadcast or sound producing instrumentalities or apparatus, or electrical transcription, or by the personal performance of singers, players and musicians sent into this State, or otherwise, of such copyrighted musical compositions within this State in the manner set forth in this section, shall be considered, for the purpose of this Act, as intra-state business of this State and subject to the control, regulation and prohibitions set forth in this Act notwithstanding that such copyrighted musical compositions originated or emanated from without this State.

SECTION 7-A. Any person, firm or corporation within this State who shall act as the representative of any combination herein declared unlawful as defined in

Section 1 hereof, shall, for the purpose of this Act, be deemed an official representative and agent of such unlawful combination and shall be construed to be doing business within this State, and service of any process against such combination may be had upon such representative or the agent of such representative as herein defined; and when so served, such process shall have the same legal effect as if served upon a duly elected officer or management or other official representative upon whom service might otherwise be made upon such combination within this State.

SECTION 7-B. Furthermore, any person or persons who negotiates for, or collects, or attempts to collect license fees of other exactions, or who acts as the representative or agent for any combination declared unlawful in Section 1 hereof, shall, for the purpose of this Act, be considered as a part of said unlawful combination; and such person, firm or corporation shall be subject to all the penalties in this Act provided for violations thereof.

SECTION 8. Any combination as in Section 1 hereof declared to be unlawful, and any other person, firm or corporation acting or attempting to act within this State in violation of the terms of this Act, or any representative or agent of any person, firm or corporation who aids or attempts to aid any such unlawful combination as defined in Section 1 hereof, in the violation of any of the terms of this Act, in any manner whatsoever, shall be punished by a fine of not less than \$50.00 or more than \$5,000.00, and by imprisonment in the penitentiary not less than one or more than ten years, or by either such fine or imprisonment.

SECTION 9. The several Circuit Courts of this State shall have jurisdiction to prevent and restrain violations of this Act, and, on the complaint of any party aggrieved because of the violation of any of the terms of this Act anywhere within this State, it shall be the duty of the State's Attorneys in their respective circuits, under the direction of the Attorney-General to institute proceedings, civil or criminal, or both, under the terms hereof, against any combination as defined in Section 1 hereof, and against any of its members, agents or representatives as herein defined, to enforce any of the rights herein conferred, and to impose any of the penalties herein provided or to dissolve any such combination as declared unlawful by Section 1 hereof. In civil actions such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of have been duly notified of such petition, the Court shall proceed, as soon as may be, to the hearing and determination of the case, and pending such petition and before final decree the Court may at any time make such temporary restraining order as shall be deemed equitable.

SECTION 10-A. Any person firm or corporation in this State aggrieved by reason of anything forbidden in this Act may sue therefor in any Circuit Court in the circuit in which the violation or a part thereof took place, to recover any damages assessed as a result of the violation of the terms of this Act, and shall be entitled to recover his or its costs; including reasonable attorney's fees to be fixed by the Court in such action.

SECTION 10-B. In the event of the failure of the State's Attorney and Attorney-General to act promptly,

as herein provided, when requested so to do by any aggrieved party, then such party may institute a civil proceeding in his own behalf or upon behalf of Plaintiff and others similarly situated, as the State's Attorney and the Attorney-General could have instituted under the terms of this Act.

SECTION 11-A. In any proceeding brought under the terms of this Act, any attorney of record for the Plaintiff may file with the Clerk of the Court in which such action is pending, a petition praying that the Defendant or Defendants be required to file with the Clerk of said Court exact copies of all documentary evidence, records or data in the possession or under the control of said Defendant or Defendants pertaining to the issues as alleged by the Plaintiff in the cause; and the Circuit Court, upon the presentation to it of such petition, shall determine what part, or all, or any of such evidence shall be produced, and enter an order to that effect. A copy of such order shall be mailed to each Defendant at his, her or its last known address, which shall be deemed sufficient notice and service upon such Defendant or Defendants. Or the same may be served by mail in the same manner upon the attorney or attorneys of record for the Defendant or Defendants, and this shall be deemed sufficient notice and service upon said Defendant or Defendants.

SECTION 11-B. If, said Defendant or Defendants shall fail to file with the Clerk of the Court in which such action is pending said copy or copies of documentary evidence, records or data, and within the time provided in said order, the Court shall adjudge such Defendant or Defendants guilty of contempt and shall assess a

fine of \$100.00 against such of the Defendants for each and every day that such Defendant or Defendants fail to comply with said order, and judgment shall be entered accordingly. And the Plaintiff may collect the same against the Defendant or Defendants with interest thereon and costs, including a reasonable attorney's fee. And the Court shall determine when the judgment is rendered what disposition shall be made of the proceeds collected after the payment of costs and attorneys fees.

SECTION 12. If any section, sub-section, sentence, clause or any part of this Act, is for any reason held or declared to be unconstitutional, imperative or void, such holding or invalidity shall not affect the remaining portions of this Act; and it shall be construed to have been the legislative intent to pass this Act without such unconstitutional, inoperative or invalid part therein; and, the remainder of this Act, after the exclusion of such part or parts, shall be held and deemed to be valid as if such excluded parts had not been included herein.

SECTION 13. Nothing in this Act shall be construed as repealing any other law or parts of laws in reference to any of the matters contained in this Act; and the rights and remedies and provisions herein provided shall be and are hereby declared to be cumulative to all other rights, remedies and provisions now provided under the laws of the State of Florida.

SECTION 14. This Act shall become effective immediately upon its becoming a law.

APPROVED by the Governor June 9, 1937.

Filed in Office Secretary of State June 10, 1937.